



STIC Search Report

EIC 2800

STIC Database Tracking Number: 149515

TO: John Chapman
Location: JEF-8D35
Art Unit : 2856
Thursday, March 31, 2005

Case Serial Number: 09/139858

From: Darcy Bates
Location: EIC 2800
JEF- 4B68
Phone: 571-272-2540

darcy.bates@uspto.gov

Search Notes

Re: 09/139,858 US 6,416,482

Attached are search results.

Litigation was found. Docket information and citations are attached.

If more searching or explanation is needed, please let me know.

**Thanks,
Darcy Bates**

Day : Thursday
 Date: 3/31/2005
 Time: 15:52:45


PALM INTRANET
Application Number Information

Application Number: **10/685240** [Order This File from PUBS Assignments](#)

Examiner Number: **68827 / MILLER, ROSE**

Filing or 371(c) Date: **10/14/2003**

Group Art Unit: **2856**

IFW IMAGE

Effective Date: **10/14/2003**

Class/Subclass: **073/585.000**

Application Received: **10/15/2003**

Lost Case: **NO**

Pat. Num./Pub. Num: **/20040074304**

Interference Number:

Issue Date: **00/00/0000**

Unmatched Petition: **NO**

Date of Abandonment: **00/00/0000**

L&R Code: Secrecy Code:**1**

Attorney Docket Number: **M33.12-0024**

Third Level Review: **NO**

Secrecy Order: **NO**

Status: **71 /RESPONSE TO NON-FINAL OFFICE ACTION ENTERED AND FORWARDED TO EXAMINER**

Status Date: **03/28/2005**

Confirmation Number: **5742**

Oral Hearing: **NO**

Title of Invention: **MULTIMEDIA FEATURE FOR DIAGNOSTIC INSTRUMENTATION**

Bar Code	PALM Location	Location Date	Charge to Loc	Charge to Name	Employee Name	Location
10685240IW	7540	03/29/2005	7549	No Charge to Name	GAUGHAN,PETER	FMF/01/ 01

Appln Info [\[Contents\]](#) [\[Petition Info\]](#) [\[Atty/Agent Info\]](#) [\[Continuity Data\]](#) [\[Foreign Data\]](#) [\[Inventors\]](#) [\[Address\]](#) [\[Fees\]](#) [\[Post Info\]](#) [\[Pre Grant Pub\]](#)

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PCT / / or PG PUBS #

Attorney Docket #

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Day : Thursday
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PALM INTRANET

Application Number Information

Application Number: 10/156415 Assignments

Filing or 371(c) Date: 05/28/2002

Effective Date: 05/28/2002

Application Received: 05/29/2002

Patent Number: 6644120

Issue Date: 11/11/2003

Date of Abandonment: 00/00/0000

Attorney Docket Number: M33.12-0023

Status: 150 /PATENTED CASE

Confirmation Number: 6023

Examiner Number: 68827 / MILLER, ROSE

Group Art Unit: 2856

IFW IMAGE

Class/Subclass: 073/585.000

Lost Case: NO

Interference Number:

Unmatched Petition: NO

L&R Code: Secrecy Code:1

Third Level Review: NO

Secrecy Order: NO

Status Date: 10/23/2003

Title of Invention: MULTIMEDIA FEATURE FOR DIAGNOSTIC INSTRUMENTATION

Bar Code	PALM Location	Location Date	Charge to Loc	Charge to Name	Employee Name	Location
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Day : Thursday
Date: 3/31/2005
Time: 15:52:39

PALM INTRANET**Continuity Information for 10/156415****Parent Data**10156415is a division of 09139858Which is a continuation of 08639694**Child Data**10685240 is a continuation of 1015641511053408 is a continuation of 1068524095000080 is a re-examination of 10156415[AppnInfo](#) [Contents](#) [Petition Info](#) [Atty/Agent Info](#) [Continuity Data](#) [Foreign Data](#) [Inventors](#) [Address](#) [Fees](#) [Post Info](#) [Pre-Grant Pub](#)

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Day : Thursday
 Date: 3/31/2005
 Time: 15:52:04

PALM INTRANET

Application Number Information

Application Number: 08/639694 Assignments

Filing or 371(c) Date: 04/29/1996

Effective Date: 04/29/1996

Application Received: 04/29/1996

Patent Number: **5811681**

Issue Date: 09/22/1998

Date of Abandonment: 00/00/0000

Attorney Docket Number: 20609.5

Status: 150 /PATENTED CASE

Confirmation Number: 7458

Examiner Number: 68827 / **MILLER, ROSE**

Group Art Unit: 2856

Class/Subclass: 073/585.000

Lost Case: NO

Interference Number:

Unmatched Petition: NO

L&R Code: Secrecy Code:1

Third Level Review: NO

Secrecy Order: NO

Status Date: 09/17/1998

Title of Invention: MULTIMEDIA FEATURE FOR DIAGNOSTIC INSTRUMENTATION

Bar Code	PALM Location	Location Date	Charge to Loc	Charge to Name	Employee Name	Location
08639694	28X1	03/22/2005	No Charge to Location	No Charge to Name	CHAPMAN JR,JOHN	JEF/08/D 35

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Day : Thursday
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Time: 15:52:11

 PALM INTRANET

Continuity Information for 08/639694

Parent Data

No Parent Data

Child Data

09139858 is a continuation of 08639694

10156415 is a division of 09139858

10685240 is a continuation of 10156415

11053408 is a continuation of 10685240

90007439 is a re-examination of 08639694

90007440 is a re-examination of 09139858

95000080 is a re-examination of 10156415

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Day : Thursday
Date: 3/31/2005
Time: 15:52:23

 PALM INTRANET

Continuity Information for 09/139858

Parent Data09139858is a continuation of 08639694**Child Data**10156415 is a division of 0913985810685240 is a continuation of 1015641511053408 is a continuation of 1068524090007440 is a re-examination of 0913985895000080 is a re-examination of 10156415[Appn Info](#) [Contents](#) [Petition Info](#) [Atty/Agent Info](#) [Continuity Data](#) [Foreign Data](#) [Inventors](#) [Address](#) [Fees](#) [Post Info](#) [Pre Grant Pub](#)Search Another: Application# or Patent# PCT / / or PG PUBS # Attorney Docket # Bar Code #

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Day : Thursday
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Time: 15:52:17

PALM INTRANET

Application Number Information

Application Number: 09/139858 Assignments

Filing or 371(c) Date: 08/25/1998

Effective Date: 08/25/1998

Application Received: 08/25/1998

Patent Number: 6416482

Issue Date: 07/09/2002

Date of Abandonment: 00/00/0000

Attorney Docket Number: 044000.0016

Status: 150 /PATENTED CASE

Confirmation Number: 5814

Examiner Number: 73103 / **WINGOOD, PAMELA**

Group Art Unit: 3736 **IFW IMAGE**

Class/Subclass: 600/559.000

Lost Case: NO

Interference Number:

Unmatched Petition: NO

L&R Code: Secrecy Code:1

Third Level Review: NO

Secrecy Order: NO

Status Date: 06/20/2002

Oral Hearing: NO

Title of Invention: MULTIMEDIA FEATURE FOR DIAGNOSTIC INSTRUMENTATION

Bar Code	PALM Location	Location Date	Charge to Loc	Charge to Name	Employee Name	Location
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PCT / / or PG PUBS #

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Litigation involving patent 6,416,482

Click on the docket number to view the docket.
Click on the above patent number to view the patent.

Docket

Case Heading

Date Filed

Date Retrvd

0:02cv3466

Bernafon, Inc v. Benson Medical

8/23/2002

12/16/2003

Litigation involving patent 20040074304

Click on the docket number to view the docket.
Click on the above patent number to view the patent.

Docket Case Heading Date Filed Date Retrvd

There are no cases involving this patent number.

Litigation involving patent 6,644,120

Click on the docket number to view the docket.
Click on the above patent number to view the patent.

Docket

Case Heading

Date Filed

Date Retrvd

0:04cv4855

Diagnostic Group, LLC v. Benson Medical Instruments
Company

11/23/2004

12/14/2004

Litigation involving patent **5,811,681**

Click on the docket number to view the docket.
Click on the above patent number to view the patent.

 Docket 	 Case Heading 	 Date Filed 	 Date Retrvd 
0:02cv777	Diagnostic Group, LLC v. Benson Medical	4/12/2002	3/31/2005

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US District Court Civil Docket

**US District Court for the District of Minnesota
(Minneapolis)**

0:02cv3466

Diagnostic Group, LLC v. Benson Medical

This case was retrieved from the court on Thursday, March 31, 2005

Date Filed: 08/23/2002	Class Code: PATENT, PROTO
Assigned To: Judge Joan N Erickson	Closed: No
Referred To: Chief Mag Judge Jonathan G Lebedoff	Statute: 35:271
Nature of suit: Patent (830)	Jury Demand: None
Cause: Patent Infringement	Demand
Lead Docket: None	Amount: \$0
Other Docket: None	
Jurisdiction: Federal Question	

Litigants

Bernafon, Inc
PLAINTIFF
[Term: 10/12/2004]

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Date	#	Proceeding Text
08/23/2002	<u>1</u>	COMPLAINT - Summons issued. Assigned to Senior Judge David S. Doty per Patent list and referred to Magistrate Judge Susan R. Nelson, rcpt no 425238 21pg(s) (DFL) (Entered: 08/30/2002)
08/23/2002	<u>2</u>	Copy of complaint mailed to Patent Office (DFL) (Entered: 08/30/2002)
08/29/2002	<u>2</u>	Summons - RETURN OF SERVICE executed upon defendant Benson Medical on 8/23/02 2pg(s) (JMR) (Entered: 09/05/2002)
09/09/2002	<input checked="" type="checkbox"/> <u>3</u>	ORDER OF DIRECTION FOR REASSIGNMENT OF RELATED CASE (Judge Joan E. Lancaster / 9/5/02) (Senior Judge David S. Doty / 9/6/02) (related case 02-777 JEL/JGL). Case reassigned to Judge Joan E. Lancaster by use of the patent list , and Case referred to Chief Mag. Judge Jonathan G. Lebedoff. Case number remains the except for Judges' initials 02-3466 JEL/JGL. Case number with only the new Judges' initials should be used on all papers and pleadings submitted to the Court regarding this civil action 02-3466 JEL/JGL. (c: attys.) 1pg (JMR) (Entered: 09/11/2002)
09/13/2002	<u>4</u>	ANSWER to complaint [1-1] and COUNTERCLAIM by Benson Medical against Bernafon, Inc. 6pg(s) (DFL) (Entered: 09/20/2002)
10/02/2002	<u>5</u>	ANSWER by Bernafon, Inc. to Counterclaim [4-2] 2pg(s) (DFL) (Entered: 10/10/2002)
10/22/2002	<u>6</u>	NOTICE of hearing pretrial conference set for 8:45 a.m. on 11/20/02 1pg(s) (DFL) (Entered: 10/30/2002)
11/13/2002	<u>7</u>	MEMORANDUM by plaintiff in opposition to defendant's motionto disqualify plaintiff's counsel. (25 pgs) (MKC) (Entered: 11/19/2002)
11/13/2002	<u>8</u>	DECLARATION of David R. Fairbairn . (48 pgs) (MKC) (Entered:

11/19/2002)

11/13/2002 9 DECLARATION of Ron Perl . (11 pgs) (MKC) (Entered: 11/19/2002)

11/13/2002 10 JOINT REPORT OF RULE 26(f) MEETING 6 pg(s) (VEM) (Entered: 11/19/2002)

11/15/2002 11 CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER (Chief Mag. Judge Jonathan G. Lebedoff / 11/14/02) re confidential information 11pg(s) (cc: all counsel) (SJH) (Entered: 11/20/2002)

11/26/2002 12 ORDER (Chief Mag. Judge Jonathan G. Lebedoff / 11/26/02) denying motion to disqualify plaintiff's counsel; the pretrial scheduling order in 02-777 is also adopted in this case 15pg(s) (cc: all counsel) (DFL) (Entered: 11/27/2002)

11/26/2002 -- PRETRIAL SCHEDULING ORDER (Chief Mag. Judge Jonathan G. Lebedoff) amendments and adding parties set for 10/1/02 ; discovery set 6/2/03 ; non-dispositive motions set for 6/16/03 ; dispositive motions set for 8/1/03 ; ready for trial set 10/1/03 3pg(s) (cc: counsel) (See Docket No. 8 in 02-777) (DFL) Modified on 11/27/2002 (Entered: 11/27/2002)

12/20/2002 13 RULE 7.1 DISCLOSURE STATEMENT by Bernafon, Inc. - William Demont Holding A/S 1pg(s) (DFL) (Entered: 01/03/2003)

01/17/2003 -- TRANSCRIPT OF hearing held 11/20/02 before Chief Mag. Judge Jonathan G. Lebedoff (Thorsgaard, Lisa M., (Neil K. Johnson Reporting Agency) 28pg (s) (SEPARATE) (see document No. 24 in 02-777) (DFL) (Entered: 01/23/2003)

06/24/2003 14 MOTION by defendant Benson Medical for leave to file dispositive motions , and to extend the applicable page limits (to Chief Mag. Judge Jonathan G. Lebedoff). 3 pg(s) (JMM) (Entered: 06/27/2003)

07/01/2003 15 MEMORANDUM by plaintiff in opposition to motion for leave to file dispositive motions [14-1], to motion to extend the applicable page limits. [14-2] 9pg(s) (DFL) (Entered: 07/07/2003)

07/15/2003 16 ORDER (Chief Mag. Judge Jonathan G. Lebedoff / 7/15/03) denying motion for leave to file dispositive motions [14-1] denying motion to extend the applicable page limits. [14-2] 3pg(s) (cc: all counsel) (DFL) (Entered: 07/21/2003)

09/18/2003 17 NOTICE of settlement conference ; settlement conference set for 1:45 p.m. 9/29/03 before Chief Judge Jonathan Lebedoff in chambers 1pg(s) (copies mailed to all counsel from chambers) (JMR) Modified on 09/22/2003 Additional attachment(s) added on 10/5/2004 (akl). (Entered: 09/22/2003)

09/29/2003 18 Pltf., Bernafon's Settlement Letter Requested By The Notice Of Settlement Conference Dated 9/17/03 and Appendix Thereto And Certificate Of Service (sealed)(separate) (JMR) (Entered: 09/29/2003)

09/29/2003 19 MINUTES:(Chief Mag. Judge Jonathan G. Lebedoff) Settlement conference held on 9/29/03 - no progress. 1pg(s) (JMR) (Entered: 09/30/2003)

04/09/2004 23 NOTICE of Appearance by Aaron Wayne Davis, Randall Thomas Skaar on behalf of Benson Medical Instruments Company. 4 pgs. (HLL) (Entered: 05/10/2004)

04/09/2004 24 MOTION for Order for Claim Construction and MOTION for Summary Judgment by Benson Medical Instruments Company. 2 pgs. (HLL) (Entered: 05/10/2004)

04/09/2004 25 MOTION for Order for Claim Construction and MOTION for Summary Judgment filed by Benson Medical Instruments Company.5 pgs. (HLL) (Entered: 05/10/2004)

04/21/2004 20 MEMORANDUM IN RESPONSE to Benson's motion for claim construction and summary judgment by Bernafon, Inc. filed by Bernafon, Inc. 7pgs (DFL) (Entered: 04/29/2004)

04/21/2004 21 DECLARATION of Dina M. Khaled re [20] Response. 6pgs (DFL) (Entered: 04/29/2004)

05/06/2004 22 Notice of Pretrial Conference: Rule 16 Pretrial Conference re request for a Markman Hearing set for 5/27/2004 02:00 PM in In Chambers Hearing before Chief Mag. Judge Jonathan G Lebedoff.Signed by Chief Mag. Judge Jonathan G Lebedoff on 5/6/04. (HLL) (Entered: 05/07/2004)

05/13/2004 26 Notice of Rescheduling Pretrial Conference to 5/27/2004 at 1:30 PM in Minneapolis - Courtroom 9E before Chief Mag. Judge Jonathan G Lebedoff. Signed by Magistrate Judge Jonathan G Lebedoff on 5/13/04. (JMM) (Entered: 05/13/2004)

05/27/2004 27 Minute Entry for proceedings held before Chief United States Magistrate Judge Jonathan G Lebedoff : Motion Hearing held on 5/27/2004 re [25] MOTION for Summary Judgment MOTION for Order to filed by Benson Medical Instruments Company. Order to be issued. (JLB) (Entered: 06/03/2004)

05/27/2004 28 ORDER granting in part and denying in part [25] Motion for Summary Judgment, granting in part and denying in part [25] Motion for Order for Claim Construction. Signed by Chief United States Magistrate Judge Jonathan G Lebedoff on 5/27/04. (JLB) (Entered: 06/03/2004)

06/10/2004 29 STATEMENT OF CASE as to Benson Medical Instruments Company, Bernafon, Inc.. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 06/10/2004)

07/02/2004 30 BRIEF [Defendant's Opening Claim Construction Brief] filed by Benson Medical Instruments Company. (Davis, Aaron) (Entered: 07/02/2004)

07/02/2004 31 DECLARATION re 30 Brief Declaration of Aaron W. Davis. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 Exhibit # 9 Exhibit # 10 Exhibit # 11 Certificate of Service)(Davis, Aaron) (Entered: 07/02/2004)

07/02/2004 32 MOTION for Order to Construe Claims by Bernafon, Inc.. (Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 33 MARKMAN BRIEF filed by Bernafon, Inc.. (Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 34 Declaration in Support of 33 Markman Brief filed by Bernafon, Inc.. (Attachments: # 1 Exhibit Index# 2 Exhibit A-1# 3 Exhibit A-2# 4 Exhibit B-1# 5 Exhibit C-1# 6 Exhibit C-2# 7 Exhibit D-1# 8 Exhibit D-2# 9 Exhibit D-3# 10 Exhibit E# 11 Exhibit F# 12 Exhibit G# 13 Exhibit H# 14 Exhibit B-2# 15 Exhibit I# 16 Exhibit J-1# 17 Exhibit J-2# 18 Exhibit J-3# 19 Exhibit J-4) (Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 35 NOTICE of Hearing on Motion 32 MOTION for Order to Construe Claims: (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 07/02/2004)

07/09/2004 36 AMENDED NOTICE of Hearing on Motion 32 MOTION for Order to Construe Claims: Motion Hearing set for 9/24/2004 09:30 AM in St Paul - Courtroom 3 before Judge Joan N Erickson. (Attachments: # 1 Certificate of Service) (Khaled, Dina) (Entered: 07/09/2004)

07/23/2004 37 MARKMAN BRIEF re 32 MOTION for Order to Construe Claims of U.S. Patent No. 6,416,482 (Rebuttal) filed by Bernafon, Inc.. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 07/23/2004)

07/23/2004 38 MARKMAN BRIEF re 32 MOTION for Order to Construe Claims [Response] filed by Benson Medical Instruments Company. (Attachments: # 1 Certificate of Service)(Davis, Aaron) (Entered: 07/23/2004)

09/24/2004 39 Minute Entry for proceedings held before Judge Joan N Erickson : Motion Hearing held on 9/24/2004 re 32 MOTION for Order to Construe Claims filed by Bernafon, Inc. is taken under advisement. (Court Reporter Maria Weinbeck) (slf) (Entered: 09/28/2004)

10/11/2004 40 Consent MOTION to Substitute Party Diagnostic Group, LLC for Bernafon, Inc. by Bernafon, Inc. (Attachments: # 1 Certificate of Service)(Khaled, Dina) Modified on 10/13/2004 (Lexvold, Rena). (Entered: 10/11/2004)

10/11/2004 41 EXHIBIT re 40 Consent MOTION to Substitute Party Diagnostic Group, LLC for Bernafon, Inc. by Bernafon, Inc. filed by Bernafon, Inc.(Khaled, Dina) Modified on 10/13/2004 (Lexvold, Rena). (Entered: 10/11/2004)

10/12/2004 42 ORDER granting 40 Motion to Substitute Party. Diagnostic Group, LLC rep by David R Fairbairn, Michael John Pape, Dina M Khaled added. Bernafon, Inc. and Bernafon, Inc. terminated. Signed by Magistrate Judge Jonathan G Lebedoff on 10/12/04. (RJL) (Entered: 10/13/2004)

12/27/2004 43 TRANSCRIPT of Proceedings: Motions hearing held on 12/27/04 before Judge Joan N. Erickson. Court Reporter: Maria Weinbeck. FILED CONVENTIONALLY (MKC) Transcript will be with Civil file 02-777. Modified Text on 12/28/2004 (MKC) (Entered: 12/28/2004)

01/06/2005 44 RULE 7.1 DISCLOSURE STATEMENT of Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 01/06/2005)

03/28/2005 45 ORDER: Motion to Construe Claims of the '681 and '482 Patents [Docket No. 45 in Civ. No. 02-777; Docket No. 32 in Civ. No. 02-3466] are construed as indicated in this Order. Signed by Judge Joan N Erickson on 03/28/05. (dak) (Entered: 03/28/2005)

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US District Court Civil Docket

**US District Court for the District of Minnesota
(Minneapolis)**

0:04cv4855

Diagnostic Group, LLC v. Benson Medical Instruments Company

This case was retrieved from the court on Thursday, March 31, 2005

Date Filed: 11/23/2004	Class Code: JYDMD, PATENT, RELTD
Assigned To: Judge Joan N Erickson	Closed: No
Referred To: Chief Mag Judge Jonathan G Lebedoff	Statute: <u>35:271</u>
Nature of suit: Patent (830)	Jury
Cause: Patent Infringement	Demand: Plaintiff
Lead Docket: None	Demand
Other Docket: None	Amount: \$0
Jurisdiction: Federal Question	

Litigants

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PLAINTIFF

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Date	#	Proceeding Text
11/23/2004	<u>1</u>	COMPLAINT with jury demand against Benson Medical Instruments Company , filed by Diagnostic Group, LLC. Assigned to Judge John R. Tunheim per Patent list and referred to Magistrate Judge Franklin L. Noel, rcpt. no. 433402, (Filing fee \$ 150.) (Attachments: # 1 Civil Cover Sheet) (DFL) (Entered: 11/24/2004)
11/23/2004	<u>2</u>	Summons Issued as to Benson Medical Instruments Company. (DFL) (Entered: 11/24/2004)
11/29/2004	<u>3</u>	APPENDIX filed re 1 Complaint,. (Khaled, Dina) (Entered: 11/29/2004)
11/29/2004	<u>4</u>	AFFIDAVIT of Service by Diagnostic Group, LLC re 1 Complaint,, Summons Issued, 2 Appendix filed November 23, 2004 (Khaled, Dina) (Entered: 11/29/2004)
11/29/2004	<u>5</u>	SUMMONS Returned Executed by Diagnostic Group, LLC. Benson Medical Instruments Company served on 11/23/2004, answer due 12/13/2004. (DFL) (Entered: 11/30/2004)
12/13/2004	<u>6</u>	ANSWER to Complaint and, COUNTERCLAIM against Diagnostic Group, LLC by Benson Medical Instruments Company. (Attachments: # 1 Certificate of Service)(Davis, Aaron) (Entered: 12/13/2004)
12/14/2004	<u>7</u>	Notice of Initial Pretrial Conference. Pretrial Conference set for 2/15/2005 09:15 AM in Minneapolis - Courtroom 9W before Magistrate Judge Franklin L Noel. Consent form included. Signed by Magistrate Judge Franklin L Noel on 12/14/04. (LJD) (Entered: 12/14/2004)
01/03/2005	<u>8</u>	ANSWER to Counterclaim by Diagnostic Group, LLC, Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 01/03/2005)
01/06/2005	<u>9</u>	RULE 7.1 DISCLOSURE STATEMENT of Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 01/06/2005)
01/28/2005	<u>10</u>	JOINT REPORT of Rule 26(f) Planning Meeting by Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) Modified TEXT on 1/31/2005 (DFL). (Entered: 01/28/2005)
02/15/2005	<u>11</u>	Minute Entry for proceedings held before Magistrate Judge Franklin L Noel : Initial Pretrial Conference held on 2/15/2005. (DFL) (Entered: 02/16/2005)
02/16/2005	<u>12</u>	Pretrial Schedule. Amended Pleadings due by 5/1/2005. Discovery due by 8/1/2005. Motions (non-disp) due 11/1/2005. Motions (disp) due by 1/1/2006. Ready for trial due by 3/1/2006. Signed by Magistrate Judge Franklin L Noel on 2/15/05. (LJD) (Entered: 02/16/2005)
03/09/2005	<u>13</u>	MOTION to Stay This Case Pending the Outcome of a Reexamination of the Patent In Suit by Benson Medical Instruments Company. (Attachments: # 1 Certificate of Service)(Skaar, Randall) (Entered: 03/09/2005)

03/09/2005 12 NOTICE of Hearing on Motion 11 MOTION to Stay This Case Pending the Outcome of a Reexamination of the Patent In Suit: Motion Hearing set for 5/13/2005 10:00 AM in Minneapolis - Courtroom 13E before Judge John R Tunheim. (Skaar, Randall) (Entered: 03/09/2005)

03/09/2005 13 MEMORANDUM in Support re 11 MOTION to Stay This Case Pending the Outcome of a Reexamination of the Patent In Suit filed by Benson Medical Instruments Company. (Skaar, Randall) (Entered: 03/09/2005)

03/09/2005 14 Declaration of Aaron W. Davis in Support of 11 MOTION to Stay This Case Pending the Outcome of a Reexamination of the Patent In Suit filed by Benson Medical Instruments Company. (Attachments: # 1 Exhibit Index# 2 Exhibit A, Part 1# 3 Exhibit A, Part 2# 4 Exhibit A, Part 3# 5 Exhibit A, Part 4# 6 Exhibit A, Part 5# 7 Exhibit A, Part 6# 8 Exhibit B# 9 Exhibit C# 10 Exhibit D# 11 Exhibit E# 12 Exhibit F# 13 Exhibit G# 14 Exhibit H)(Skaar, Randall) (Entered: 03/09/2005)

03/10/2005 15 MOTION to Reassign Case by Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 03/10/2005)

03/10/2005 16 MEMORANDUM in Support re 15 MOTION to Reassign Case filed by Diagnostic Group, LLC. (Khaled, Dina) (Entered: 03/10/2005)

03/10/2005 17 Declaration of Dina M. Khaled in Support of 15 MOTION to Reassign Case filed by Diagnostic Group, LLC. (Khaled, Dina) (Entered: 03/10/2005)

03/10/2005 18 NOTICE of Hearing on Motion 15 MOTION to Reassign Case: Motion Hearing set for 5/13/2005 10:00 AM in Minneapolis - Courtroom 13E before Judge John R Tunheim. (Khaled, Dina) (Entered: 03/10/2005)

03/30/2005 19 ORDER OF DIRECTION TO THE CLERK OF COURT FOR REASSIGNMENT OF RELATED CASE. Case reassigned to Judge Joan N Ericksen and Magistrate Judge Jonathan G Lebedoff per patent list for all further proceedings. Case related to 02-777 JNE/JGL. Judge John R Tunheim, Magistrate Franklin L Noel no longer assigned to case. Signed by Judge John R Tunheim on 3/30/05, by Judge Joan N. Erickson on 3/15/05. (MKC) (Entered: 03/30/2005)

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US District Court Civil Docket

US District Court for the District of Minnesota (Minneapolis)

0:02cv777

Diagnostic Group, LLC v. Benson Medical

This case was retrieved from the court on Thursday, March 31, 2005

Date Filed: 04/12/2002	Class Code: PATENT, PROTO, RELTD
Assigned To: Judge Joan N Erickson	Closed: No
Referred To: Chief Mag Judge Jonathan G Lebedoff	Statute: <u>35:271</u>
Nature of suit: Patent (830)	Jury
Cause: Patent Infringement	Demand: None
Lead Docket: None	Demand
Other Docket: None	Amount: \$0
Jurisdiction: Federal Question	

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Date	#	Proceeding Text
04/12/2002	<u>1</u>	COMPLAINT - Summons issued. Assigned to Judge John R. Tunheim per Patent list and referred to Magistrate Judge Susan R. Nelson. (20pg(s) Receipt #422337 (DDB) (Entered: 04/17/2002)
04/12/2002	<u>2</u>	a copy of the complaint was sent to the Commissioner of Patent & Trademarks. (DDB) (Entered: 04/17/2002)
05/02/2002	<u>2</u>	ORIGINAL SUMMONS AND RETURN OF SERVICE executed upon defendant Benson Medical on 4/12/02 2pg(s) (DFL) (Entered: 05/06/2002)
05/03/2002	<u>3</u>	ANSWER to complaint [1-1] and COUNTERCLAIM by Benson Medical against Bernafon, Inc. 7pg(s) (DFL) (Entered: 05/07/2002)
05/09/2002	<u>4</u>	NOTICE OF PRETRIAL CONFERENCE (Magistrate Judge Susan R. Nelson / 5/8/02) pretrial status conference set for 6/11/02 5pg(s) (cc: all counsel) (PAK) (Entered: 05/10/2002)
05/20/2002	<u>5</u>	NOTICE (Clerk Richard D. Sletten / 5/20/02) Case reassigned to Judge Joan E. Lancaster and Case referred to Magistrate Judge Arthur J. Boylan . (1pg(s) (cc: all counsel) (CJF) (Entered: 05/21/2002)
05/28/2002	<u>6</u>	ANSWER by Bernafon, Inc. to Counterclaim [3-2] 3pg(s) (DFL) (Entered: 05/30/2002)
05/30/2002	<u>7</u>	JOITNT REPORT PURSUANT TO RULE 26(f) . (7 pgs) (MKC) (Entered: 06/07/2002)
06/12/2002		PRETRIAL SCHEDULING ORDER (Magistrate Judge Arthur J. Boylan /

8 6/11/02) amendments and adding parties set for 10/1/02 ; discovery set 6/2/03 ; non-dispositive motions set for 6/16/03 ; dispositive motions set for 8/1/03 ; ready for trial set 10/1/03 3pg(s) (cc: counsel) (DFL) (Entered: 06/14/2002)

06/20/2002 9 NOTICE OF REASSIGNMENT OF MAGISTRATE JUDGE (Clerk Richard D. Sletten /) Case referred to Chief Mag. Judge Jonathan G. Lebedoff 1 pg(s) (cc: all counsel) (VEM) (Entered: 06/20/2002)

07/30/2002 10 STIPULATION FOR PROTECTIVE ORDER 11pg(s) (SEA) (Entered: 08/05/2002)

07/30/2002 11 PROTECTIVE ORDER (Chief Mag. Judge Jonathan G. Lebedoff) granting stipulation [10]; The Clerk of Court is directed to maintain the confidentiality of the documents filed in accordance with the foregoing stipulation. 11pg(s) (cc: all counsel) (SEA) (Entered: 08/05/2002)

09/09/2002 12 ORDER For Reassignment Of Related Case (Judge Joan E. Lancaster / 9/5/02)(Judge David S. Doty / 9/6/02) number 02 cv 3466 shall be assigned to Judge Joan E. Lancaster by use of the patent list. A copy of this order shall be placed in each of these files. 1pg(s) (c: attys.) (JMR) (Entered: 09/26/2002)

10/29/2002 13 MOTION by defendant to disqualify plaintiff's counsel (to Chief Mag. Judge Jonathan G. Lebedoff) , ret. 11/12/02 at 9:00 a.m. 1pg(s) (DFL) (Entered: 11/06/2002)

10/29/2002 14 MEMORANDUM by defendant in support of motion to disqualify plaintiff's counsel [13-1] 11pg(s) (DFL) (Entered: 11/06/2002)

10/29/2002 15 AFFIDAVIT of Joanne H. Turner regarding motion to disqualify plaintiff's counsel [13-1] 14pg(s) (DFL) (Entered: 11/06/2002)

10/29/2002 16 AFFIDAVIT of Stephen Benson regarding motion to disqualify plaintiff's counsel [13-1] 5pg(s) (DFL) (Entered: 11/06/2002)

11/01/2002 17 NOTICE by defendant of hearing setting hearing for motion to disqualify plaintiff's counsel (to Chief Mag. Judge Jonathan G. Lebedoff) [13-1] at 8:30 a.m. on 11/20/02 1pg(s) (DFL) Modified on 09/19/2003 (Entered: 11/08/2002)

11/13/2002 18 MEMORANDUM by plaintiff in opposition to defendant's motion to disqualify plaintiff's counsel. [13-1] (22 pgs) (MKC) (Entered: 11/19/2002)

11/13/2002 19 DECLARATION of Ron Perl re motion to disqualify plaintiff's counsel. [13-1] (9 pgs) (MKC) (Entered: 11/19/2002)

11/13/2002 20 DECLARATION of David R. Fairbairn re motion to disqualify plaintiff's counsel . [13-1] (10 pgs) (MKC) (Entered: 11/19/2002)

11/20/2002 21 MINUTES: (Chief Mag. Judge Jonathan G. Lebedoff) taking under advisement on the motion to disqualify plaintiff's counsel [13-1] 2pg(s) (DFL) (Entered: 11/26/2002)

11/26/2002 22 ORDER (Chief Mag. Judge Jonathan G. Lebedoff / 11/26/02) denying motion to disqualify plaintiff's counsel [13-1]; that the pretrial scheduling order in this case is also adopted in 02-cv-3466 15pg(s) (cc: all counsel) (DFL) (Entered: 11/27/2002)

12/20/2002 23 RULE 7.1 DISCLOSURE STATEMENT by Bernafon, Inc. - William Demont Holding A/S pg(s) (DFL) (Entered: 01/03/2003)

01/17/2003 24 TRANSCRIPT OF hearing held 11/20/02 before Chief Mag. Judge Jonathan G. Lebedoff (Thorsgaard, Lisa M. (Neil K. Johnson Reporting Agency)) 28pg (s) (SEPARATE) (DFL) (Entered: 01/23/2003)

01/22/2003 25 RULE 7.1 DISCLOSURE STATEMENT by defendant Benson Medical that it has no parent corporation or publicly held corporation owns 10 percent or more of its stock 2pg(s) (JMH) (Entered: 01/31/2003)

05/16/2003 26 AMENDED ANSWER [1-1] by defendant. 6 pg(s) (JMM) (Entered:

05/22/2003)

06/24/2003 27 MOTION by defendant Benson Medical for leave to file dispositive motions , and to extend the applicable page limits (to Chief Mag. Judge Jonathan G. Lebedoff). 4 pg(s) (JMM) (Entered: 06/27/2003)

07/01/2003 28 MEMORANDUM by plaintiff in opposition to motion for leave to file dispositive motions [27-1], to motion to extend the applicable page limits. [27-2] 9pg(s) (DFL) (Entered: 07/07/2003)

07/15/2003 29 ORDER (Chief Mag. Judge Jonathan G. Lebedoff / 7/15/03) denying motion for leave to file dispositive motions [27-1] denying motion to extend the applicable page limits. [27-2] 3pg(s) (cc: all counsel) (DFL) (Entered: 07/21/2003)

09/18/2003 30 NOTICE OF SETTLEMENT CONFERENCE - (Chief Mag. Judge Jonathan G. Lebedoff / 9/17/03) ; settlement conference set for 1:45 p.m. 9/29/03 in Chambers 1pg(s) (cc: all counsel) (copies mailed to all counsel from chambers) (JMR) Modified on 09/19/2003 Additional attachment(s) added on 10/26/2004 (akl). (Entered: 09/19/2003)

09/24/2003 31 Pltf. Bernafon's Settlement Letter Requested By The Notice Of Settlement Conference dated 9/17/03 and Appendix Thereto (sealed) (separate) (JMR) (Entered: 09/29/2003)

09/29/2003 32 MINUTES:(Chief Mag. Judge Jonathan G. Lebedoff) Settlement conference held on 9/29/03 - no progress. 1pg(s) (JMR) (Entered: 09/30/2003)

04/09/2004 36 NOTICE of Appearance by Aaron Wayne Davis, Randall Thomas Skaar on behalf of Benson Medical Instruments Company. 4 pgs (HLL) (Entered: 05/10/2004)

04/09/2004 37 MOTION for Order for Claim Construction and MOTION for Summary Judgment by Benson Medical Instruments Company. 2 pgs. (HLL) (Entered: 05/10/2004)

04/09/2004 38 MEMORANDUM in Support re [37] MOTION for Order for Claim Construction and MOTION for Summary Judgment filed by Benson Medical Instruments Company. 5 pgs. (HLL) (Entered: 05/10/2004)

04/21/2004 33 MEMORANDUM IN RESPONSE TO BENSON'S motion for claim construction and summary judgment by Bernafon, Inc. filed by Bernafon, Inc. 7pgs (DFL) (Entered: 04/29/2004)

04/21/2004 34 DECLARATION of Dina M. Khaled re [33] Response. 6pgs (DFL) (Entered: 04/29/2004)

05/06/2004 35 Notice of Pretrial Conference: Rule 16 Pretrial Conference re request for a Markman Hearing set for 5/27/2004 02:00 PM in In Chambers Hearing before Chief Mag. Judge Jonathan G Lebedoff. Signed by Chief Mag Judge Jonathan G Lebedoff on 5/6/04. (HLL) Additional attachment(s) added on 5/10/2004 (Labat, Heather). (Entered: 05/07/2004)

05/13/2004 39 Notice of Rescheduling Pretrial Conference to 5/27/2004 at 1:30 PM in Minneapolis - Courtroom 9E before Chief Mag. Judge Jonathan G Lebedoff. Signed by Magistrate Judge Jonathan G Lebedoff on 5/13/04. (JMM) (Entered: 05/13/2004)

05/27/2004 40 Minute Entry for proceedings held before Chief United States Magistrate Judge Jonathan G Lebedoff : Motion Hearing held on 5/27/2004 re [37] MOTION for Summary Judgment MOTION for Order to filed by Benson Medical Instruments Company. Order to be issued. (JLB) (Entered: 06/03/2004)

05/27/2004 41 ORDER granting in part and denying in part [37] Motion for Summary Judgment, granting in part and denying in part [37] Motion for Order for Claim Construction. Signed by Chief United States Magistrate Judge Jonathan G Lebedoff on 5/27/04. (JLB) (Entered: 06/03/2004)

06/10/2004 42 STATEMENT OF CASE as to Benson Medical Instruments Company,

Bernafon, Inc.. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 06/10/2004)

07/02/2004 43 BRIEF [Defendant's Opening Claim Construction Brief] filed by Benson Medical Instruments Company. (Davis, Aaron) (Entered: 07/02/2004)

07/02/2004 44 DECLARATION of Aaron W. Davis. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 # 9 Exhibit # 10 Exhibit # 11 Certificate of Service)(Davis, Aaron) Modified--created relationship on 7/2/2004 (Labat, Heather). (Entered: 07/02/2004)

07/02/2004 45 MOTION for Order to Construe Claims by Bernafon, Inc.. (Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 46 MEMORANDUM in Support re 45 MOTION for Order to Construe Claims filed by Bernafon, Inc.. (Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 47 NOTICE of Hearing on Motion 45 MOTION for Order to Construe Claims: (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 07/02/2004)

07/02/2004 48 Declaration in Support of 45 Memorandum in Support of Motion filed by Bernafon, Inc.. (Attachments: # 1 Exhibit Index# 2 Exhibit A-1# 3 Exhibit A-2# 4 Exhibit B-1# 5 Exhibit B-2# 6 Exhibit C# 7 Exhibit D# 8 Exhibit E-1# 9 Exhibit E-2# 10 Exhibit E-3# 11 Exhibit F# 12 Exhibit G# 13 Exhibit H# 14 Exhibit I# 15 Exhibit J-1# 16 Exhibit J-2# 17 Exhibit J-3# 18 Exhibit J-4# 19 Exhibit J-5)(Khaled, Dina) Modified on 7/6/2004 (Duda, Lisa). (Entered: 07/02/2004)

07/09/2004 49 AMENDED NOTICE of Hearing on Motion 45 MOTION for Order to Construe Claims: Motion Hearing set for 9/24/2004 09:30 AM in St Paul - Courtroom 3 before Judge Joan N Erickson. (Attachments: # 1 Certificate of Service) (Khaled, Dina) (Entered: 07/09/2004)

07/23/2004 50 MARKMAN BRIEF re 45 MOTION for Order to Construe Claims of U.S. Patent No. 5,811,681 (Rebuttal) filed by Bernafon, Inc.. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 07/23/2004)

07/23/2004 51 MARKMAN BRIEF re 45 MOTION for Order to Construe Claims [Response] filed by Benson Medical Instruments Company. (Attachments: # 1 Certificate of Service)(Davis, Aaron) (Entered: 07/23/2004)

09/24/2004 52 Minute Entry for proceedings held before Judge Joan N Erickson : Motion Hearing held on 9/24/2004 re 45 MOTION for Order to Construe Claims filed by Bernafon, Inc. is taken under advisement. (Court Reporter Maria Weinbeck) (slf) (Entered: 09/28/2004)

10/11/2004 53 Consent MOTION to Substitute Party Diagnostic Group, LLC for Bernafon, Inc. by Bernafon, Inc. (Attachments: # 1 Certificate of Service)(Khaled, Dina) Modified on 10/13/2004 (Lexvold, Rena). (Entered: 10/11/2004)

10/11/2004 54 EXHIBIT re 53 Consent MOTION to Substitute Party Diagnostic Group, LLC for Bernafon, Inc. by Bernafon, Inc. filed by Bernafon, Inc. (Khaled, Dina) Modified on 10/13/2004 (Lexvold, Rena). (Entered: 10/11/2004)

10/12/2004 55 ORDER granting 53 Motion to Substitute Party. Diagnostic Group, LLC added. Bernafon, Inc. and Bernafon, Inc. terminated. Signed by Magistrate Judge Jonathan G Lebedoff on 10/12/04. (RJL) (Entered: 10/13/2004)

12/27/2004 56 TRANSCRIPT of Proceedings: Motions hearing held on 9/24/04 before Judge Joan N. Erickson. Court Reporter: Maria Weinbeck. FILED CONVENTIONALLY (MKC) (Entered: 12/28/2004)

01/06/2005 57 RULE 7.1 DISCLOSURE STATEMENT of Diagnostic Group, LLC. (Attachments: # 1 Certificate of Service)(Khaled, Dina) (Entered: 01/06/2005)

03/28/2005 58 ORDER: Motion to Construe Claims of the '681 and '482 Patents [Docket No. 45 in Civ. No. 02-777; Docket No. 32 in Civ. No. 02-3466] are construed as indicated in this Order. Signed by Judge Joan N Erickson on 03/28/05. (dak) (Entered: 03/28/2005)

03/30/2005 ORDER OF DIRECTION TO THE CLERK OF COURT FOR

59 REASSIGNMENT OF RELATED CASES. Case no 04-4855 be assigned to Judge Joan N. Erickson, nunc pro tunc. Signed by Judge Joan N Ericksen on 3/15/05, by Judge John R. Tunheim on 3/30/05. (MKC) (Entered: 03/30/2005)

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Terms: [patno=6416482](#) ([Edit Search](#))

139858 (09) 6416482 July 9, 2002

UNITED STATES PATENT AND TRADEMARK OFFICE GRANTED PATENT

6416482

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[Link to Claims Section](#)

July 9, 2002

Multimedia feature for diagnostic instrumentation

REEXAM-LITIGATE:

NOTICE OF LITIGATION

Bernafon, Inc. v. Benson Medical Instruments Company, Filed August 23, 2002, D.C.
Minnesota, Doc. No. 02-3466 DSD/SRN

INVENTOR: Braun, Leroy - 11403 Pollyanna, Austin, Texas, 78753; Foreman, Jack - 806
Yale St., Pflugerville, Texas, 78660

APPL-NO: 139858 (09)

FILED-DATE: August 25, 1998

GRANTED-DATE: July 9, 2002

ASSIGNEE-AFTER-ISSUE: July 30, 2002 - ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS)., BERNAFON, INC. 9675 WEST 76TH STREET EDEN PRAIRIE MINNESOTA 55344, Reel and Frame Number: 013138/0675
August 21, 2002 - CHANGE OF NAME (SEE DOCUMENT FOR DETAILS)., THERMO FINNIGAN, LLC 355 RIVER OAKS PARKWAY SAN JOSE CALIFORNIA 95134-1991, Reel and Frame Number: 013203/0824

LEGAL-REP: Akin, Gump, Strauss, Hauer & Feld, L.L.P. - # #0

PUB-TYPE: July 9, 2002 - Utility Patent having no previously published pre-grant publication (B1)

PUB-COUNTRY: United States (US)

REL-DATA:

Continuation of Ser. No. 08/639694, April 29, 1996, GRANTED PATENT 5811681, Utility Patent having no previously published pre-grant publication (A)

US-MAIN-CL: 600#559


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patno=6416482

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Syntax Definition

<u>and</u>	and
<u>or</u>	or
<u>w/N</u>	within N words
<u>not w/N</u>	not within N words
<u>pre /N</u>	precedes by N words
<u>w/p</u>	in same paragraph
<u>not w/p</u>	not in same paragraph
<u>w/seg</u>	in same segment
<u>not w/seg</u>	not in same segment
<u>w/s</u>	in same sentence
<u>not w/s</u>	not in same sentence
<u>and not</u>	and not

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3/31/05

US 6,416,482

09/139858

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Query/Command : us6416482/pn

** SS 5: Results 1

Search statement 6

Query/Command : prt fu legalall max

1 / 1 PLUSPAT - @QUESTEL-ORBIT - image
PN - US6416482 B1 20020709 [US6416482]
TI - (B1) Multimedia feature for diagnostic instrumentation
IN - (B1) BRAUN LEROY (US); FOREMAN JACK (US)
AP - US13985898 19980825 [1998US-0139858]
FD - Cont. of US639694 19960429 [1996US-0639694]
Continuation of: US5811681
PR - US13985898 19980825 [1998US-0139858]
US63969496 19960429 [1996US-0639694]
IC - (B1) A61B-005/00
EC - A61B-005/12B
PCL - ORIGINAL (O) : 600559000
DT - Corresponding document
CT - US4847763; US5023783; US5239872; US5645074
STG - (B1) U.S. Patent (no pre-grant pub.) after Jan. 2, 2001
AB - A method for automatedly administering an audiometric test includes the steps of controlling an audiometer to selectively switch the audiometer output between test tones generated by the audiometer and sound signals generated from digital information; first switching the audiometer output to sound signals when the step of controlling indicates a beginning of a new test, a completion of a current test, or a test error; outputting sound representative of the sound signals after the step of first switching; second switching the audiometer output to test tones after the step of outputting; and outputting test tones until the next step of first switching.
UP - 2002-29

1 / 1 LGST - @EPO
PN - US6416482 B1 20020709 [US6416482]
AP - US13985898 19980825 [1998US-0139858]
ACT - 20020730 US/AS-A
ASSIGNMENT
OWNER: BERNAFON, INC. 9675 WEST 76TH STREET EDEN PRAIRIE;
EFFECTIVE DATE: 20011231
ASSIGNMENT OF ASSIGNEES INTEREST;ASSIGNOR:THERMO FINNIGAN,
LLC;REEL/FRAME:013138/0675
UP - 2004-47

1 / 1 CRXX - @CLAIMS/RRX
AN - 3714609
PN - 6,416,482 A 20020709 [US6416482]
PA - Braun, Leroy; Foreman, Jack
PT - M (Mechanical)
ACT - 20020730 REASSIGNED
ASSIGNMENT OF ASSIGNEES INTEREST

3/31/05

US 6,416,482

09/139858

Assignor: THERMO FINNIGAN, LLC DATE SIGNED: 12/31/2001

Assignee: BERNAFON, INC. 9675 WEST 76TH STREET EDEN PRAIRIE
MINNESOTA 55344

Reel 013138/Frame 0675

Contact: KINNEY & LANGE, P.A. MICHAEL J. PAPE 312 SOUTH THIRD
STREET MINNEAPOLIS, MN 55415-1002

20020821 REASSIGNED
CHANGE OF NAME

Assignor: FINNIGAN CORPORATION DATE SIGNED: 10/25/2000

Assignee: THERMO FINNIGAN, LLC 355 RIVER OAKS PARKWAY SAN JOSE
CALIFORNIA 95134-1991

Reel 013203/Frame 0824

Contact: KINNEY & LANGE, P. A. MICHAEL J. PAPE 312 SOUTH THIRD
STREET MINNEAPOLIS, MN 55415-1002

20040909 REASSIGNED
CHANGE OF NAME

Assignor: MAICO, LLC, DATE SIGNED: 02/29/2004

Assignee: DIAGNOSTIC GROUP, LLC, 7625 GOLDEN TRIANGLE DRIVE, EDEN
PRAIRIE, MINNESOTA, 55344

Reel 015098/Frame 0206

Contact: MICHAEL J. PAPE, 312 SOUTH THIRD ST., KINNEY & LANGE,
P.A., MINNEAPOLIS, MN 55415-1002

20040909 REASSIGNED
CONFIRMATORY ASSIGNMENT FOR 12/31/03 ASSIGNMENT

Assignor: BERNAFON, INC., DATE SIGNED: 08/29/2004

Assignee: OTICON, INC., 29 SCHOOLHOUSE ROAD, SOMERSET, NEW JERSEY,
08873

Reel 015098/Frame 0190

Contact: MICHAEL J. PAPE, 312 SOUTH THIRD ST., KINNEY & LANGE,
P.A., MINNEAPOLIS, MN 55415-1002

20040909 REASSIGNED
CONFIRMATORY ASSIGNMENT FOR 12/31/03 ASSIGNMENT

Assignor: OTICON, INC., DATE SIGNED: 08/29/2004

3/31/05

US 6,416,482

09/139858

Assignee: MAICO, LLC, 7625 GOLDEN TRIANGLE DRIVE, EDEN PRAIRIE,
MINNESOTA, 55344

Reel 015098/Frame 0202

Contact: MICHAEL J. PAPE, 312 SOUTH THIRD ST., KINNEY & LANGE,
P.A., MINNEAPOLIS, MN 55415-1002

UP - 2003-10
URAS- 2005-03-22

1 / 1 LITA - @Thomson Derwent
AN - P2002-44-10
FS - PATENT (P)
PN - US6416482 20020709 (Utility)
TI - Multimedia feature for diagnostic instrumentation
PCL - 6000000000
IN - Braun Leroy - Austin TX;
Foreman Jack - Pflugerville TX
PA - not available
IT - Surgery
PF - Bernafon Incorporated
DF - Benson Medical
CT - MN
DN - 02-3466DSD/SRN
FD - 2002-08-23
ACT - A complaint was filed.
UP - 2002-44

Search statement 6

Query/Command : fam us6416482/pn

1 Patent Groups
** SS 6: Results 4

Search statement 7

Query/Command : famstate nonstop

1 / 4 PLUSPAT - @QUESTEL-ORBIT - image
PN - US6416482 B1 20020709 [US6416482]
STG - (B1) U.S. Patent (no pre-grant pub.) after Jan. 2, 2001
TI - (B1) Multimedia feature for diagnostic instrumentation
IN - (B1) BRAUN LEROY (US); FOREMAN JACK (US)
IC - (B1) A61B-005/00
AP - US13985898 19980825 [1998US-0139858]
PR - US13985898 19980825 [1998US-0139858]
US63969496 19960429 [1996US-0639694]
EC - A61B-005/12B
PCL - ORIGINAL (O) : 600559000

3/31/05

US 6,416,482

09/139858

DT - Corresponding document
UP - 2002-29

1 / 1 *LEGALI - @EPO*
PN - US6416482 B1 20020709 [US6416482]
AP - US13985898 19980825 [1998US-0139858]
ACTE- 20020730 US/AS-A
ASSIGNMENT
OWNER: BERNAFON, INC. 9675 WEST 76TH STREET EDEN PRAIRIE;
EFFECTIVE DATE: 20011231
ASSIGNMENT OF ASSIGNORS INTEREST;ASSIGNOR:THERMO FINNIGAN,
LLC;REEL/FRAME:013138/0675
UP - 2004-47

2 / 4 *PLUSPAT - @QUESTEL-ORBIT - image*
PN - US6644120 B1 20031111 [US6644120]
STG - (B1) U.S. Patent (no pre-grant pub.) after Jan. 2, 2001
TI - (B1) Multimedia feature for diagnostic instrumentation
PA - (B1) BERNAFON INC (US)
PA0 - Bernafon, Inc., Eden Prairie MN [US]
IN - (B1) BRAUN LEROY (US); FOREMAN JACK (US)
IC - (B1) A61B-001/22 A61B-005/12
AP - US15641502 20020528 [2002US-0156415]
PR - US15641502 20020528 [2002US-0156415]
US13985898 19980825 [1998US-0139858]
US63969496 19960429 [1996US-0639694]
EC - A61B-005/12B
PCL - ORIGINAL (O) : 073585000; CROSS-REFERENCE (X) : 073660000
600559000 702057000
DT - Corresponding document
UP - 2003-47

3 / 4 *PLUSPAT - @QUESTEL-ORBIT - image*
PN - US5811681 A 19980922 [US5811681]
STG - (A) United States patent
TI - (A) Multimedia feature for diagnostic instrumentation
PA - (A) FINNIGAN CORP (US)
PA0 - Finnigan Corporation, San Jose CA [US]
IN - (A) BRAUN LEROY (US); FOREMAN JACK (US)
IC - (A) A61B-001/22 A61B-005/12
AP - US63969496 19960429 [1996US-0639694]
PR - US63969496 19960429 [1996US-0639694]
EC - A61B-005/12B
PCL - ORIGINAL (O) : 073585000; CROSS-REFERENCE (X) : 600559000
DT - Basic

1 / 1 *LEGALI - @EPO*
PN - US5811681 A 19980922 [US5811681]
AP - US63969496 19960429 [1996US-0639694]
ACTE- 19961001 US/AS02-A
ASSIGNMENT OF ASSIGNEE'S INTEREST
OWNER: FINNIGAN CORPORATION 355 RIVER OAKS PARKWAY SAN JOSE,
EFFECTIVE DATE: 19960429
19961001 US/AS02-A

3/31/05

US 6,416,482

09/139858

ASSIGNMENT OF ASSIGNOR'S INTEREST
OWNER: BRAUN, LEROY; EFFECTIVE DATE: 19960429

19961001 US/AS02-A
ASSIGNMENT OF ASSIGNOR'S INTEREST
OWNER: FOREMAN, JACK; EFFECTIVE DATE: 19960621

20020730 US/AS-A
ASSIGNMENT
OWNER: BERNAFON, INC. 9675 WEST 76TH STREET EDEN PRAIRIE;
EFFECTIVE DATE: 20011231
ASSIGNMENT OF ASSIGNORS INTEREST;ASSIGNOR:THERMO FINNIGAN,
LLC;REEL/FRAME:013138/0675

UP - 2004-47

4 / 4 PLUSPAT - ©QUESTEL-ORBIT - image
PN - US2004074304 A1 20040422 [US20040074304]
STG - (A1) Utility Patent Application published on or after January 2, 2001
TI - (A1) Multimedia feature for diagnostic instrumentation
IN - (A1) BRAUN LEROY (US); FOREMAN JACK (US)
IC - (A1) A61B-005/12
AP - US68524003 20031014 [2003US-0685240]
PR - US68524003 20031014 [2003US-0685240]
US15641502 20020528 [2002US-0156415]
US13985898 19980825 [1998US-0139858]
US63969496 19960429 [1996US-0639694]
EC - A61B-005/12B
PCL - ORIGINAL (O) : 073585000; CROSS-REFERENCE (X) : 702122000
600559000
DT - Corresponding document
UP - 2004-18

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Syntax Definition

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<u>or</u>	or
<u>w/N</u>	within N words
<u>not w/N</u>	not within N words
<u>pre_N</u>	precedes by N words
<u>w/p</u>	in same paragraph
<u>not w/p</u>	not in same paragraph
<u>w/seg</u>	in same segment
<u>not w/seg</u>	not in same segment
<u>w/s</u>	in same sentence
<u>not w/s</u>	not in same sentence
<u>and not</u>	and not

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2005 U.S. Dist. LEXIS 5030, *

Diagnostic Group, LLC, Plaintiff v. Benson Medical Instruments Company, Defendant

Civ. No. 02-777 (JNE/JGL), Civ. No. 02-3466 (JNE/JGL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2005 U.S. Dist. LEXIS 5030

March 28, 2005, Decided

CORE TERMS: audiometer, patent, signal, conventional, tone, generator, outputting, multimedia, switching, specification, analog, patentee, digital, switch, invention, generating, pre-programmed, output, sound wave, message, logical, intrinsic evidence, testing, circuitry, corresponding, construe, input, rebutted, signal generator, audible

COUNSEL: [*1] David R. Fairbairn, Esq., Michael J. Pape, Esq., and Dina M. Khaled, Esq., Kinney & Lange, appeared on behalf of Diagnostic Group, LLC.

Randall T. Skaar, Esq., and Aaron W. Davis, Esq., Patterson Thuente Skaar & Christensen P.A., appeared on behalf of Benson Medical Instruments Company.

JUDGES: JOAN N. ERICKSEN, United States District Judge

OPINIONBY: JOAN N. ERICKSEN

OPINION: ORDER

Diagnostic Group, LLC (Diagnostic) brought this action against Benson Medical Instruments Company (Benson) alleging claims of patent infringement. The case is before the Court on the parties' motions for construction of disputed claim terms pursuant to Markman v. Westview Instruments, Inc., 52 F.3d 967, 970-71 (Fed. Cir. 1995), aff'd, 517 U.S. 370 (1996).

I. BACKGROUND

Diagnostic owns the patent rights to U.S. Patent No. 5,811,681 ('681 Patent) and U.S. Patent No. 6,416,482 ('482 Patent). Both the '681 and '482 Patents involve audiometers, which are devices used to test an individual's hearing. A typical audiometer presents a test tone, generally through headphones, to a test subject who acknowledges that a test tone was heard by pressing a hand switch. The audiometer then [*2] evaluates the response from the hand switch to determine whether a specific test tone was heard by the test subject.

During the testing process, a test subject might make an error. For example, a test subject might press the hand switch more than once after hearing only one tone, fail to release the hand switch, or press the hand switch when no tone has been presented. Diagnostic contends that at the time of the filing of the '681 Patent, a conventional audiometer required a human test administrator to determine when such an error occurred and which instruction was necessary to respond to the error, to interrupt the test process to instruct

the test subject, and then restart or resume the test. ('681 Patent, col. 6, 11.30-67.)

The '681 and '482 Patents are directed to an audiometer device used for automated testing, or testing that does not require human intervention to automatically identify an error made by the test subject and to provide a corrective instruction to the test subject before it automatically resumes or restarts the test. The '681 Patent specifically instructs that the claimed invention, "relates to a multimedia interface of a diagnostic test instrument and, more [*3] particularly, to automated testing, including multimedia-derived instructions, test monitoring, and error response, by an audiometer or other medical device or diagnostic test instrument." ('681 Patent, col. 1,11. 5-9.) Diagnostic claims that the '681 and '482 Patents were a substantial departure from the prior art because the patented audiometer is "smarter" than the prior art audiometers. This is so because the audiometer itself, rather than a human test administrator, can determine when it is appropriate to switch from presenting test tones to presenting sound signals to instruct the test subject. In addition, Diagnostic claims that the patented audiometer system determines whether an error has occurred, provides appropriate corrective instructions and resumes or restarts the test. Diagnostic also claims that the claimed inventions' automatic error instructions clarify the test procedure, increase test consistency and reduce administration time.

II. DISCUSSION

A. Prior art and prosecution history

The '681 Patent was filed on April 29, 1996, as U.S. Patent Application No. 08/639,694 ('694 application). The '482 Patent was filed on August 25, 1998, as U.S. Patent Application [*4] No. 09/139,858 ('858 application) and is a continuation of the '694 application, which matured into the '681 Patent. In examining the '694 application, the United States Patent Office identified three pertinent pieces of prior art: U.S. Patent No. 4,847,763 (the Moser Patent); U.S. Patent No. 3,809,811 (the Deslisle Patent); and U.S. Patent No. 4,489,610 (the Slavin Patent).

1. Prior art

The Moser Patent teaches interactive audiometric test systems adapted to selectively generate audiologic hearing test signals made up of a computer that controls a disc player. The disc player delivers selected, pre-stored signals in response to a human administrator's manual commands or in accordance with a predetermined program. The disc player does not control the succession of signals played. Moser explains that an advantage of its audiometer is that "the testing procedure can be easily conducted enabling the examiner to put his full attention to the examinee due to the easy operation of the new audiometer system allowing for quick and exact selection of any one of a number [sic] of available test signals recorded on the disc." (Moser Patent, col. 3, 11. 25-30.) A human test administrator [*5] monitors the responses received from the test subject. (Moser Patent, col. 7,11. 41-68; col. 8,11. 1-3.)

The Deslisle Patent describes an "apparatus for automatically conducting a basic audiometric test on a subject." (Deslisle Patent, col. 1,11. 4-5.) The Deslisle Patent utilizes a tape player that is operated under the control of a computer to instruct the test subject and to provide some testing sounds. The tape player itself does not perform any logical testing procedure. The Deslisle audiometer also utilizes a pre-recorded tape of voice instructions and series of words, also under the control of the computer, which instructs the test subject how to take the test. n1

- - - - - Footnotes - - - - -

n1 Benson argues that the Delisle Patent contained error control and described an automated hearing test, but acknowledged at oral argument that the Deslisle audiometer could not pass on specific instructions to the test subject in response to an error made by the test subject.

- - - - - End Footnotes - - - - -

Finally, the Slavin Patent discloses a "computerized audiometer for [*6] testing the hearing of one person or variable numbers of people at the same time, and for generating programming for a programmable hearing aid." (Slavin Patent, col. 1,11. 7-10.) The Slavin audiometer includes a tone generator, an audible instruction generator, and a computer. The tone generator provides tones as directed by the computer to test a subject's hearing. The audible instruction generator provides instructions, which are stored in a predetermined sequence and which must be synchronized with the tone generator. The instructions are dictated by the computer and include pauses between the instructions to allow for the presentation of test tones. (Slavin Patent, col. 2, 11. 34-43.) A human administrator must supervise the administration of the test to ensure proper responses. (Slavin Patent, col. 3,11. 48-63.)

2. Prosecution history estoppel

Arguments and amendments made during the prosecution of a patent are properly examined to determine the meaning of terms in the claims. See Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1576 (Fed. Cir. 1995). "Although the prosecution history can and should be used to understand the language used in the [*7] claims, it cannot 'enlarge, diminish, or vary' the limitations in the claims." Markman, 53 F.3d at 980 (quoting Goodyear Dental Vulcanite Co. v. Davis, 102 U.S. 222, 227 (1880)). The prosecution history, however, does limit the interpretation of claim terms when there has been a clear disavowal or disclaimer during the prosecution in order to obtain allowance. See 3M Innovative Props. Co. v. Avery Denison, Corp., 350 F.3d 1365, 1371 (Fed. Cir. 2003); but see Omega Eng'g, Inc. v. Raytek Corp., 334 F.3d 1314, 1324 (Fed. Cir. 2003) (noting that the doctrine of prosecution disclaimer does not apply when alleged disavowal of scope is ambiguous). When "remarks made to distinguish prior art are broader than necessary to distinguish the prior art, the full breadth of the remark is not a clear and unambiguous disavowal of claim scope." 3M, 350 F.3d at 1373.

During its prosecution, the Patent Office issued an Office Action rejecting all twenty-two claims of the '694 application. On February 25, 1998, the patentees filed an Amendment (the Amendment). In the Amendment, the patentees distinguished the invention from [*8] the Moser, Deslise and Slavin patents. Benson argues that to secure allowance of the '681 Patent, the patentees made arguments that limited the scope of their invention to a specific physical configuration. n2 For example, with respect to the Moser Patent, the patentees stated:

Applicants' claimed invention, on the other hand, comprises a computer and a conventional audiometer. The conventional audiometer is, in effect, the Moser device, i.e., a sound source and a computer. The audiometer includes stored sound sequences that are selected by a processor of the audiometer to be output in a select succession or predetermined program according to a logical procedure responsive to a test subject's input. The audiometer, thus includes the stored sound sequence function of the CD player . . . and the test sequencing function of the computer (albeit an internal processor or logic circuitry, rather than a stand alone external computer). In addition to this conventional audiometer analogous to the Moser device, Applicant's [sic] claimed invention includes another computer with its own processor, memory

and peripherals. This additional computer allows multimedia functions to be added [*9] to the conventional audiometer.

- - - - - Footnotes - - - - -

n2 Because Benson's prosecution history estoppel argument relates to several of the terms to be construed, the Court will address this argument prior to construing the individual terms. The Court will revisit Benson's estoppel argument where appropriate.

- - - - - End Footnotes - - - - -

In addition, with respect to the Deslisle Patent, the patentees stated:

The amendments to Applicants' claims particularly illustrate the distinction that a conventional audiometer performing a select logical testing procedure (not merely providing detectable output) is controlled by a computer that adds multimedia features to the testing.

Further, with respect to the Slavin Patent, the patentees stated:

Slavin includes a tone generator and an audible instruction generator, and a computer that switches between the two. The tone generator merely provides tones as directed by the computer, and does not include any logical operations. The audible instruction generator provides instructions dictated by the computer, [*10] but likewise does not itself perform any logical operations.

Applicants' claimed invention differs in that the audiometer that provides the test signals has certain logical capabilities to conduct the test responsive to the test subject's inputs. The logical capabilities of the audiometer are enhanced by the computer which controls the audiometer and, thus, the particular logical operations of the audiometer. The computer adds logical possibilities for the testing procedure and provides multimedia features to the testing environment.

....

Slavin merely provides computerized switching between test tones and sound signals. The test tones and sound signals are not generated through any select logical testing procedures of the tone generator or the audible instruction generator.

Applicants' claimed invention includes the audiometer that performs a select logical testing procedure and the computer that controls the audiometer and adds multimedia.

Based on the above statements, Benson argues that the patentees differentiated their invention with the prior art so as to require *all* claims of the '681 and '482 Patents to include a conventional audiometer, which includes [*11] pre-programmed logic, and a physically separate computer with multimedia functions. Benson further argues that the

inventive contribution of the '681 Patent was not adding an error control mechanism, but rather the addition of a physically separate computer.

Diagnostic does not dispute that the claimed invention was distinguished from the prior art references, but argues that Benson misstates the inventive contribution of the '681 Patent by suggesting that it is a specific structural configuration of the claimed audiometer that is inventive. Diagnostic acknowledges that during the prosecution history, the patentees highlighted a novel feature of the invention; namely, the addition of multimedia functions via an additional computer to automate a hearing test. Diagnostic argues, however, that the fundamental invention of the '681 Patent is the ability to eliminate the human test administrator by automatically identifying errors, determining when to respond to an error, and providing corrective instructions or responses to the test subject. Diagnostic asserts there is nothing in the prosecution history that requires the functionality associated with the conventional audiometer to be [*12] physically separate from that of the computer that provides the multimedia.

Here, the prosecution history does not clearly establish that the patentees unambiguously disavowed the scope so as to require all of the claims of the '681 and '482 Patents to include both a conventional audiometer, which includes pre-programmed logic, and a separate computer with multimedia functions. Instead, in the Amendment, the patentees distinguished the claimed invention from the Moser, Delisle and Slavin Patents, none of which teaches a method for automatically identifying an error or automatically providing a corrective response, and explained that these prior art references taught only devices comparable in function to a conventional audiometer. The patentees emphasized that the claimed invention included multimedia capabilities that enabled an automatic testing environment -- capabilities that the prior art references lack. (Amend, at 8-12.) Specifically the patentees stated:

This is an [sic] essence and [sic] tremendous advantage of Applicants' claimed invention. Applicants can use a conventional audiometer, add a computer with multimedia operations, and achieve an entirely or substantially [*13] automated audiometric testing environment. The conventional audiometer has certain, but limited, logical functions during the testing procedure. Those logical functions provide certain pre-programmed responses dictated by the test subject's inputs. In the event of certain errors or other occurrences in testing operation of the conventional audiometer, the audiometer has limited or no logical response and testing can be undesirably halted. (In such instances in testing with conventional audiometers, operator intervention is required at this point to correct the problems) [sic] and re-initiate the test. By addition of the computer, in conjunction with the audiometer, for testing, the computer can, through desired programming, provide logical results for virtually every error or occurrence. This speeds testing, allows multiple testing, and limits requirements of operator involvement or intervention, and furthermore is a low-cost solution to this automation of audiometric testing because conventional audiometers are employed and enhanced.

(Amend, at 9.) The patentees did not assert that the distinguishing feature of the claimed invention was either the combination of the sound [*14] source (compact disc or tape player) and the computer of the prior art into one element or the simple addition of a separate computer to a conventional audiometer.

The specification language further supports the conclusion that the claims do not require

the specific physical configuration of the components and related functions proposed by Benson. For example, the patent specification teaches that "there are variations and alternatives in the configuration" of the computer and the basic audiometer. ('681 Patent, col. 12,11. 53-67; col. 13, 11. 1-17.) To the extent that the patentees distinguished the prior art in a way that suggests a specific physical configuration, the Court finds that these distinctions were broader than necessary and do not constitute a clear disavowal of claim scope. See, 3M, 350 F.3d at 1373. Accordingly, the Court rejects Benson's prosecution estoppel argument insofar as it seeks to limit *all* claims of both the '681' and '482' Patents to include a conventional audiometer, which includes pre-programmed logic, and a physically separate computer with multimedia functions.

B. Claim construction

Patent claim construction is a matter of [*15] law for the Court. Markman, 52 F.3d at 979. Proper claim construction requires an examination of the intrinsic evidence of the record, including the claims of the patent language, the specification, and the prosecution history. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582-83 (Fed. Cir. 1996). The Court begins with the language of the claims. *Id.* at 1582. The claims are given their ordinary meaning as understood by one of ordinary skill in the art, unless the inventor intended the terms to be construed otherwise. Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc., 222 F.3d 951, 955 (Fed. Cir. 2000). There is a heavy presumption in favor of the ordinary meaning of claim language. Johnson Worldwide Assocs. v. Zebco Corp., 175 F.3d 985, 989 (Fed. Cir. 1999). Dictionaries are a useful resource for the Court in determining the ordinary meaning of a disputed claim term, although the Court must examine the intrinsic record to ensure that the dictionary definition is consistent with the patentee's use of the words in the context of the patent. See Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202-03 (Fed. Cir. 2002). [*16]

Claim language must also be construed in light of the specifications and prosecution history. Vitronics, 90 F.3d at 1582. However, only after the Court determines the disputed terms ordinary meaning does it turn to the intrinsic record to determine if this meaning was rebutted. See Texas Digital, 308 F.3d at 1204 (noting that consulting the patent's written description before attempting to discern the "ordinary and customary" meaning of the term, "invites a violation of [Federal Circuit] precedent counseling against importing limitations into the claims"). The ordinary meaning will be rebutted where the patentee, acting as his or her own lexicographer, clearly sets forth an explicit definition different from the ordinary meaning. See Texas Digital, 308 F.3d at 1204. Further, the presumption will be rebutted "if the inventor has disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of a claim scope." *Id.* Absent an express intent to impart a novel meaning in the specification or prosecution history, "terms in a claim are to be given their ordinary [*17] and accustomed meaning." Reinshaw PLC v. Marposs Societa Per Azioni, 158 F.3d 1243, 1249 (Fed. Cir. 1998).

In most situations, intrinsic evidence will resolve any ambiguity in a disputed term, and it is improper to rely on extrinsic evidence when intrinsic evidence serves to resolve such ambiguity. Vitronics, 90 F.3d at 1583. Extrinsic evidence may be consulted, however, to ensure that the claim construction is not inconsistent with widely held understandings in the pertinent field. See Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1308 (Fed. Cir. 1999). In considering extrinsic evidence, however, the Court may not use it to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence. See Karlin Tech., Inc. v. Surgical Dynamics, Inc., 177 F.3d 968, 971 (Fed. Cir. 1999). n3

- - - - - Footnotes - - - - -

n3 Dictionaries, encyclopedias and treatises are always available to a court during claim construction. See *Texas Digital*, 308 F.3d at 1203 (noting it is entirely proper to consult dictionaries at any stage of litigation and explaining that categorizing dictionaries as "extrinsic evidence" is misplaced).

- - - - - End Footnotes- - - - - [*18]

C. Disputed claim terms n4

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n4 Defendant originally identified the following claim terms as disputed and in need of construction by the Court: "selectively causes;" "selectively switch;" "switching;" "the computer controls the switch;" "first switching" and "multimedia audiometer." Defendant has since withdrawn its request to construe these terms. Because these claims have been withdrawn, and because after reviewing the claim language and specifications, the Court believes that these terms and phrases are self-explanatory as used in their respective claims, construction is not necessary. See *Lucent Techs., Inc. v. Newbridge Networks Corp.*, 168 F. Supp. 2d 181, 191 n.3 (D. Del. 2001) (explaining no additional construction needed where phrases were self-explanatory); *Goldtouch Techs. Inc. v. Microsoft Corp.*, No. A99CA336SS, 2000 WL 855555, at *4 (W.D. Tex. January 14, 2000) (same).

- - - - - End Footnotes- - - - -

The '681 Patent is entitled "Multimedia Feature for Diagnostic Instrumentation." It includes [*19] twenty-five claims. The disputed terms appear in independent claims 4 and 6 of the '681 Patent, which are reproduced in their entirety below:

Claim 4:

A multimedia audiometer, including a conventional audiometer and a computer, comprising:

means for outputting sound signals generated from digital information of the computer;

means for outputting test signals generated by the conventional audiometer according to pre-programmed logic of the conventional audiometer;

means for switching between the means for outputting sound signals and the means for outputting test signals, the means for switching being communicatively connected with the means for outputting sound signals and the means for outputting test signals; and

means for controlling the means for switching, the means for controlling being communicatively connected with the means for switching.

Claim 6:

An audiometer testing device, comprising:

- a processor;
- a memory, communicatively connected with the processor, for storing digital data;
- a sound wave generator, for generating analog sound signals in respect of digital data electrically connected with the processor; a test signal generator; [*20] and
- a logic circuit connected with the test signal generator and the processor;

wherein the logic circuit and the sound wave generator are controlled by the processor to selectively cause either the sound wave generator or the test signal generator to output discernable signals.

The '482 Patent is entitled "Multimedia Feature for Diagnostic Instrumentation." It includes fourteen claims. The disputed terms appear in claims 1, 4 and 9 of the '482 Patent. Those claims, stated in their entirety, read as follows:

Claim 1:

A method for automatedly administering an audiometric test, comprising the steps of:

- controlling an audiometer to selectively switch the audiometer output between test tones generated by the audiometer and sound signals generated from digital information;
- first switching the audiometer output to sound signals when the step of controlling indicates a particular condition;
- outputting sound representative of sound signals after the step of switching;
- second switching the audiometer output to test tones after the step of outputting; and
- outputting test tones until the next step of first switching.

Claim 4:

A multimedia [*21] audiometer, comprising:

- a multimedia computer;
- a tone generator;
- a switch connected with the computer and the tone generator;

wherein the switch selectively causes either the tone generator or the computer to output sound waves and the computer controls the switch.

Claim 9:

A method of performing a diagnostic test protocol, comprising the steps of:
outputting audible sound;
generating a test tone;
storing a digital data;
generating an analog sound derived from the digital data;
switching the audible sound from the step of outputting between the test tone and the analog signal;
processing the digital data; and
controlling the steps of outputting, generating the test tone, storing, generating the analog sound, and switching.

1. Audiometer

The term "audiometer" appears in claim 6 of the '681 Patent and claim 1 of the '482 Patent. n5 Diagnostic asserts that "audiometer" should be construed as "an instrument; for measuring hearing." Benson proposes that the term "audiometer" be construed as a "a computer and a conventional audiometer."

- - - - - Footnotes - - - - -

n5 Because the parties each propose the same construction for this term as used in both Patents and because the Court's construction is supported by both Patents' specifications, the Court construes the term "audiometer" consistently.

- - - - - End Footnotes- - - - - [*22]

The dictionary definition of "audiometer" is "[a]n instrument for measuring hearing activity for pure tones of normally audible frequencies."

The *American Heritage Dictionary* of the English Language 121 (3d ed. 1996). Next, the Court turns to the intrinsic evidence to determine whether the ordinary meaning has been rebutted. In examining the written description of both the '681 and '482 Patents, the Court concludes that "audiometer" is referred to as "an electrically activated generator of test tones for evaluation of hearing." ('681 Patent, col. 1, 11. 13-14; '482 Patent, col. 1,11. 16-17.) This use is consistent with the term's ordinary meaning.

Benson argues, however, that Diagnostic is limited to its proposed construction because of arguments made by the patentees during the prosecution of the '681 Patent. Specifically, Benson argues that the patentees narrowed the meaning of their invention by representing that it included a conventional audiometer and a separate computer. Diagnostic, on the other hand, denies that the patentees ever defined the term "audiometer" as a conventional audiometer and a separate computer, or that it ever disavowed claim scope outside of a conventional [*23] audiometer and a separate computer.

As discussed previously, the Court rejects Benson's attempt to import structural limitations

into individual claim terms based on its prosecution history estoppel argument. With respect to this term in particular, the fact that the patentees specified that its multimedia audiometer in claim 4 included a conventional audiometer and a computer does not constitute a clear and unambiguous surrender of subject matter so as to define "audiometer" in claim 6 as a conventional audiometer and a separate computer. See Middleton, Inc. v. Minn. Mining & Mfg. Co., 311 F.3d 1384, 1388 (Fed. Cir. 2002) (explaining that the disavowal of claim scope requires a clear and unambiguous surrender of subject matter). Therefore, the Court adopts the term's ordinary meaning and construes "audiometer" as "an instrument for measuring hearing."

2. Conventional audiometer

The term "conventional audiometer" appears in claim 4 of the '681 Patent. Diagnostic proposes that "conventional audiometer" be construed as "[a] device having both microprocessor and audio circuitry for administering a hearing test." Benson agrees that the construction of "conventional [*24] audiometer" must include microprocessor and audio circuitry, but unlike Diagnostic, asserts that pre-programmed test logic must also be contained in the "conventional audiometer." Benson argues that the patentees have acted as their own lexicographers and claims that the prosecution history reveals that the patentees previously argued that the "conventional audiometer" performed logical testing procedures dictated by pre-programmed logic. Benson further argues that the claim language itself demonstrates that the preprogrammed testing logic must be located in the conventional audiometer. ('681 Patent, claim 4 (providing that "test signals generated by the conventional audiometer according to preprogrammed logic of the conventional audiometer")).

The Court begins by ascertaining the ordinary meaning to one skilled in the art of "conventional audiometer." First, the Court has already construed the term "audiometer" as "an instrument for measuring hearing." Second, "conventional" is an adjective commonly defined as: "Based on or in accordance with general agreement, use, or practice; customary." *American Heritage Dictionary* 411. Therefore, the ordinary meaning of "conventional audiometer" [*25] is an instrument for measuring hearing that was customary, or in accordance with general agreement, use or practice, at the time of the filing of the '681 Patent. At that time, a "conventional audiometer," like those of the Moser, Slavin and Deslisle Patents, consisted of a sound source and computer. Thus, the Court presumes that the term "conventional audiometer" carries this ordinary meaning unless otherwise rebutted or altered by intrinsic evidence.

To determine how the term "conventional audiometer" is used in the '681 Patent, the Court next consults the specification, which explains that the "conventional audiometer is generally comprised of three parts: microprocessor circuitry, audio circuitry and certain optional elements." ('681 Patent, col. 4, 11. 37-39.) This definition is consistent with the ordinary meaning. Moreover, as explained above, during the prosecution of the '681 Patent, the patentees distinguished the claimed invention from the devices taught by Moser, Slavin and Delisle, noting that these devices were analogous to the "conventional audiometer" of the '681 Patent; namely, a computer and a sound source. Therefore, the prosecution history reinforces that, at the [*26] time of filing of the '681 Patent, the "conventional audiometer" was a device for measuring hearing activity that contained microprocessor circuitry and audio circuitry. Finally, contrary to Benson's proposed construction, the language of claim 4 itself informs that pre-programmed logic resides in the conventional audiometer. Thus, any definition of "conventional audiometer" that specifically includes "pre-programmed logic" would be redundant in the context of the claim language as a whole.

The Court concludes that the intrinsic evidence is consistent with the term's ordinary meaning and that Benson's proposed construction requiring that "pre-programmed logic" be

imported into the construction of "conventional audiometer" is improper. Therefore, the Court concludes that the proper construction of "conventional audiometer" is "a device having both microprocessor and audio circuitry for administering a hearing test."

3. Computer.

The term "computer" appears in claim 4 of the '681 Patent. Diagnostic asserts that "computer" should be construed as "a personal computer, another type of computer, or some other processing and storage device having multimedia capabilities." Benson asserts [*27] that the term "computer" should be construed as a "computer with multimedia functions."

The relevant dictionary meaning of "computer" is "[a] device that computes, especially a programmable electronic machine that performs highspeed mathematical or logical operations or that assembles, stores, correlates, or otherwise processes information." *American Heritage Dictionary* 389. The specification of the '681 Patent explains that a "computer" includes "a personal computer; another type of computer, or some other processing and storage device" having "multimedia capabilities." ('681 Patent, col. 7,11. 15-25.) The parties do not dispute that the term "computer," as used in this claim, must be limited to having multimedia functions or capabilities. The Court agrees and, therefore, construes the term "computer" to mean "a personal computer, another type of computer, or some other processing and storage device having multimedia capabilities." At oral argument, Benson indicated that it did not object to this construction, with the understanding that the phrase "having multimedia capabilities" modified the entire definition.

4. Pre-programmed logic

The term "pre-programmed logic" [*28] appears in claim 4 of the '681 Patent. Diagnostic asserts that "pre-programmed logic" should be construed as "software and/or hardware that provides preset responses dictated by the test subject's inputs." Benson asserts that the term "pre-programmed logic" must include the logical testing procedure and proposes that it be construed as a "pre-programmed logic for the hearing test." Benson also claims that while it does not necessarily disagree with Diagnostic's proposal, its proposed construction is more straightforward.

The definition of "preprogram" is "to program in advance." *American Heritage Dictionary* 1431. The definition of "logic" in the field of computer science is "a. The nonarithmetic operations performed by a computer, such as sorting, comparing, and matching, that involve yes-no decisions, b. Computer circuitry, c. Graphic representation of computer circuitry." Id. at 1057. Using these definitions, the ordinary meaning of "pre-programmed logic" is computer source code (software) programmed into a device and/or computer circuitry (hardware) for performing a specified function.

The Court next examines the intrinsic evidence and determines that the ordinary meaning [*29] has not been rebutted. However, remarks made by the patentees in the Amendment clarify the meaning of "pre-programmed logic" in the context of the invention. Specifically, the patentees stated that: "the conventional audiometer has certain, but limited, logical functions during the testing procedure. These logical functions provide certain pre-programmed responses dictated by the test subject's inputs." (Amend, at 9.) These remarks demonstrate that "providing preset responses dictated by the test subject's inputs" is the "specified function" of the software or hardware. On the other hand, there is nothing in the intrinsic evidence that persuades the Court to import Benson's proposed "for the hearing test" limitation into the construction. Therefore, the term "pre-programmed logic" is properly construed as "software and/or hardware that provides preset responses dictated by the test subject's inputs."

5. Sound wave generator

The term "sound wave generator" appears in claim 6 of the '681 Patent. Diagnostic asserts that "sound wave generator" should be construed as "a device for generating longitudinal pressure waves of audible or inaudible sound, including analog signals representative [*30] of voice instructions and/or messages." Benson proposes that "sound wave generator" be construed as a "sound wave generator in the computer."

The relevant definition of "sound wave" is "[a] longitudinal pressure wave of audible or inaudible sound." *American Heritage Dictionary* 1722. The ordinary meaning of a "sound wave generator" is therefore "a device for generating longitudinal pressure waves of audible or inaudible sound." Diagnostic proposes that the Court add the phrase "including analog signals representative of voice instructions and/or messages" to the term's meaning and argues that the claim language instructs that the "sound waves" must include analog sound signals. Benson, on the other hand, argues that it would be improper to limit the construction of the claim to the sound of a human voice and argues that Diagnostic's proposed construction is complicated and confusing. In addition, Benson proposes that the Court construe the term so as to locate the "sound wave generator" within the computer portion of the audiometer.

Looking first to the claim language itself, the text of the entire claim reads "a sound wave generator, for generating analog sound signals in respect [*31] of digital data electrically connected with the processor." Reviewing that language as a whole, the Court concludes that it would be redundant to include the phrase "including analog signals" in the definition of "sound wave generator." In addition, the patent specification does not support limiting the term "analog sound signals" to signals "representative of voice instructions and/or messages." Accordingly, the intrinsic record does not support a departure from the term's ordinary meaning.

Further, the Court rejects Benson's argument that language found in the patent's specification stating that the computer "should have multimedia capabilities, that is the computer should be capable of producing sound waves and/or manipulated within or by the computer" limits the claim's construction. ('681 Patent, col. 7, 11. 24-28.) This language refers to a preferred embodiment. In light of the fact that the claim language itself does not limit sound wave generation to the computer, the Court refuses to import any such limitation into the claim itself. See *Texas Instruments, Inc. v. United States Int'l Trade Comm'n*, 805 F.2d 1558, 1563 (Fed. Cir. 1986) (cautioning against limiting [*32] the claimed invention to preferred embodiments). Accordingly, the term "sound wave generator" is properly construed as "a device for generating longitudinal pressure waves of audible or inaudible sound."

6. Test signal generator

The term "test signal generator" appears in claim 6 of the '681 Patent. Diagnostic asserts that "test signal generator" should be construed as "a device for generating test tones." Benson argues that signals and tones are not the same and therefore it would be improper to import the word tone into the claim. Benson also asks the Court to locate the "test signal generator" in the conventional audiometer based on its prosecution history estoppel argument. Specifically, Benson argues that in order to argue around the Moser Patent, the patentees asserted that their "invention differs in that the audiometer that provides the test signals has certain logical capabilities to conduct the test responsive to the test subject's inputs."

The Court finds that the intrinsic record does not support a departure from this claim term's ordinary meaning. Specifically, the patent specification does not explicitly set forth that test

signals are identical to test tones. [*33] Further, as discussed previously, the Court rejects Benson's attempt to import structural limitations into the term. The Court, instead, concludes that the term is sufficiently clear and does not require construction. See *Lucent Techs., Inc. v. Newbridge Networks Corp.*, 168 F. Supp. 2d 181, 191 n.3 (D. Del. 2001); *Goldtouch Techs. Inc. v. Microsoft Corp.*, No. A99CA336SS, 2000 WL 855555, at *4 (W.D. Tex. January 14, 2000).

7. Logic Circuit

The phrase "a logic circuit connected with the test signal generator and the processor" appears in claim 6 of the '681 Patent. Diagnostic initially asserted that "logic circuit" should be construed as "hardware and/or software for alternatively enabling either the sound wave generator or the test signal generator to output discernible signals." Benson proposes that the entire phrase be construed as a "a logic circuit to run the hearing test in the conventional audiometer connected with the test signal generator and processor." In its rebuttal, Diagnostic modified its proposed construction of "logic circuit" to "the software and/or hardware that provides pre-programmed, or preset, responses dictated by the test" [*34] subject's inputs."

The Court begins by ascertaining the ordinary meaning of "logic circuit" to one skilled in the art. The relevant definition of "logic" in the field of computer science is "a. The nonarithmetic operations performed by a computer, such as sorting, comparing, and matching, that involve yes-no decisions, b. Computer circuitry, c. Graphic representation of computer circuitry." *American Heritage Dictionary* 1057. Moreover, the definition of "circuit" in the field of electronics is "(a) a closed path followed or capable of being followed by an electric current; (b) a configuration of electrically or electromagnetically connected components or devices." *Id.* at 346. Using these definitions, the ordinary meaning of "logic circuit" is "the software and/or hardware used for performing a specified function."

The Court next turns to the intrinsic evidence to determine whether the ordinary meaning has been rebutted or altered. Diagnostic argues that its proposed construction is supported by the intrinsic record, specifically the Amendment, wherein the patentees argued that the "logic circuit" added intelligence to the test signal generator, such that they could provide [*35] certain preprogrammed responses dictated by the test subject's inputs. Benson, on the other hand, reiterates its prosecution history estoppel argument, asserting that the logic circuit for the hearing test must be located in the conventional audiometer. In particular, Benson argues that the patentees argued that the logic circuitry was located in the conventional audiometer and that a second computer with multimedia functions added other multimedia operations.

As discussed previously, the Court rejects Benson's argument that the claimed invention covers only a specific physical configuration. Benson has not pointed to any specific language in the intrinsic record indicating that the "logic circuit" is for running a hearing test or that the "logic circuit" must reside in the conventional audiometer. In addition, the Court finds that remarks made by the patentees in the Amendment clarify the meaning of "logic circuit" in the context of the invention. Specifically, the Amendment added the "logic circuit" and indicated that logic circuit functions to "provide certain pre-programmed responses dictated by the test subject's inputs" that did not exist in the prior art. (Amend, at 9.) These [*36] remarks demonstrate that "providing preset responses dictated by the test subject's inputs" is the specified function of the software or hardware of the circuit. Therefore, the Court concludes that the proper construction of "logic circuit" is "the software and/or hardware that provides pre-programmed, or preset, responses dictated by the test subject's inputs."

8. Wherein the logic circuit and the sound wave generator are controlled by the processor to selectively cause either the sound wave generator or the test signal generator to output

discernable signals

This "wherein phrase" appears in claim 6 of the '681 Patent. Diagnostic asserts that this phrase should be construed to require "the processor to intelligently and automatically direct either the logic circuit to cause the test signal generator to deliver test tones or, following the occurrence of a test subject error, the sound wave generator to output computer-generated corrective instructions." Benson again attempts to limit the phrase to require a specific structural configuration, proposing that this phrase be construed as, "wherein the logic circuit of the conventional audiometer and the sound wave generator of the [*37] computer with multimedia functions are controlled by the processor to selectively cause either the sound wave generator of the computer with multimedia functions or the test signal generator in the conventional audiometer to output discernable signals." In effect, Benson requests that the Court rewrite the claims.

"Sound wave generator" was previously construed as "a device for generating longitudinal pressure waves of audible or inaudible sound" and "logic circuit" was construed as "the software and/or hardware that provides pre-programmed, or preset, responses dictated by the test subject's inputs." n6 In addition, the Court has already determined that the term "test signal generator" does not require construction by the Court. As discussed previously, the Court rejects Benson's attempt to import structural limitations not supported by the intrinsic evidence. Finally, the Court finds that there is nothing ambiguous or linguistically obscure about this phrase and that it is, therefore, sufficiently clear such that no further construction is necessary. Accordingly, the Court declines to construe this claim. See Lucent Techs., 168 F. Supp. 2d at 191 n.3; Goldtouch Techs., 2000 WL 855555, [*38] at *4.

- - - - - Footnotes - - - - -

n6 The Court notes that neither party's proposed construction of this claim language incorporates definitions of "sound wave generator" or "logic circuit."

- - - - - End Footnotes - - - - -

9. Controlling an audiometer to selectively switch the audiometer output

The phrase "controlling an audiometer to selectively switch the audiometer output" appears in claim 1 of the '482 Patent. Diagnostic proposes that this phrase be construed as "intelligently and automatically directing the audiometer to exchange the audiometer output between test tones generated by the audiometer and voice instructions and/or messages generated from digital information." The Court notes that Diagnostic's proposed construction would improperly import limitations into the claim language and, therefore, rejects this proposed construction. For example, there is nothing in the intrinsic evidence that explicitly sets forth a definition of this phrase so as to incorporate the word "intelligently." The Court further finds that this phrase is sufficiently clear and [*39] does not require construction. See Lucent Techs., 168 F. Supp. 2d at 191 n.3; Goldtouch Techs., 2000 WL 855555, at *4.

10. Sound signals generated from digital information

The phrase "sound signals generated from digital information" appears in claim 1 of the '482 Patent. Diagnostic asserts that "sound signals generated from digital information" should be construed as "analog signals representative of voice instructions and/or messages." Benson does not propose a definition, but asserts that the "digital information" must be stored in the computer, arguing that this phrase should be construed as a "sound signals generated from digital information in the computer."

"Sound" is defined as a "sensation perceived by the sense of hearing." *Webster's Third New Int'l Dictionary of The English Language Unabridged* 2176 (2002). A "signal" is "a detectable physical quantity or impulse (such as voltage, current, or magnetic field strength) by which messages or information can be transmitted." *Webster's* 2115. Therefore, the ordinary meaning of "sound signal" is "a detectable physical quantity or impulse that can be perceived by the sense of hearing [***40**] and by which messages or information can be transmitted."

Next, the Court turns to the intrinsic evidence to determine whether the ordinary meaning has been rebutted. Both parties refer to the Description of the Preferred Embodiments to support their proposed constructions. Diagnostic argues the '482 Patent specification explains that "sound signals from digital information" are analog signals representative of voice instructions and/or messages. ('482 Patent, col. 10,11. 28-35; col. 11,11. 13-21; col. 12,11. 56-69.) Benson, on the other hand, argues that it would be improper to rewrite the limitation that, in the end, makes the claim language more complicated. Benson also argues that the specification language requires that the digital information be in the computer because the description of a preferred embodiment provides that "the test subject may . . . receive the following instructions generated from the digital data stored by [the] computer." ('482 Patent, col. 11,11. 37-39.)

While the Court acknowledges that "sound signals generated from digital information" certainly can be representative of voice instructions and/or messages, the specification does not explicitly set [***41**] forth a definition different than the claim language. The '482 Patent specification also indicates that "the particular signals could be representative of virtually any type of information which is subject to derivation from digital data . . . for example, visual graphics and images and others." ('482 Patent, col. 10, 11. 35-40.) Even though the claim itself specifically limits its scope to sound signals, it does not specifically limit it to sounds representative of the human voice.

The Court finds that there is nothing in the patent specification that rebuts the presumption giving "sound signals generated from digital information" its plain and ordinary meaning and therefore refuses to import the limitations proposed by Diagnostic into the claim. In addition, as previously discussed, the Court rejects Benson's attempt to import structural limitations into claim 1. The Court therefore construes the term as "detectable physical quantities or impulses, generated from digital information, that can be perceived by the sense of hearing by which messages or information can be transmitted."

*11. First switching the audiometer output to sound signals when the step of controlling indicates [***42**] a particular condition*

The phrase "first switching the audiometer output to sound signals when the step of controlling indicates a particular condition" appears in claim 1 of the '482 Patent. However, the Court finds that there is nothing ambiguous or linguistically obscure about this phrase and that it is sufficiently clear such that no further construction is necessary. The Court, therefore, declines to construe this claim language. See *Lucent Techs.*, 168 F. Supp. 2d at 191 n.3; *Goldtouch Techs.*, 2000 WL 855555, at *4.

12. Tone generator

The term "tone generator" appears in claim 4 of the '482 Patent. Diagnostic asserts that "tone generator" should be construed as "a device for generating sounds of distinct pitch, quality, and duration; i.e., tones." Benson does not propose a definition, but asserts that the "tone generator" must be located in the conventional audiometer.

The dictionary definition of "tone" is "[a] sound of distinct pitch, quality, and duration; a note." *American Heritage Dictionary* 1886. Therefore, the plain and ordinary meaning of

"tone generator" is "a device for generating sounds of distinct pitch, quality, and [*43] duration." Next, the Court must examine the intrinsic evidence to determine whether that ordinary meaning has been rebutted or altered. Diagnostic argues that nothing in the specification or prosecution history assigns a different meaning to "tone generator." Based on its prosecution history estoppel argument, Benson argues that the Court must construe the term "tone generator" so as to require that it be located in the conventional audiometer. Finding nothing in the prosecution history that clearly limits the claim so as to require it to reside in the conventional audiometer, the Court assigns the term its plain and ordinary meaning. The Court therefore construes the term as "a device for generating a tone, or a sound of distinct pitch, quality, and duration."

13. The switch selectively causes either the tone generator or the computer to output sound waves and the computer controls the switch

The phrase "the switch selectively causes either the tone generator or the computer to output sound waves and the computer controls the switch" appears in claim 4 of the '482 Patent. The Court finds that there is nothing ambiguous or linguistically obscure about this phrase and that it [*44] is sufficiently clear such that no further construction is necessary. The Court, therefore, declines to construe this claim language. See Lucent Techs., 168 F. Supp. 2d at 191 n.3; Goldtouch Techs., 2000 WL 855555, at *4.

14. Generating a test tone

The phrase "generating a test tone" appears in claim 9 of the '482 Patent. Diagnostic asserts that this phrase should be construed as "generating a tone, or a sound of distinct pitch, quality and duration." Benson does not propose a definition, but asserts that all tones must be generated in the conventional audiometer.

The Court has already determined that a tone is "a sound of distinct pitch, quality, and duration." In addition, in the context of claim 9 and the specification, a "test tone" is a tone generated as part of a test protocol. In order for a tone to be utilized in a hearing test, it must be capable of being measured so that one can ascertain the extent of the test subject's hearing abilities. The Court concludes, therefore, that the ordinary meaning of "generating a test tone" is "generating a tone, or a sound of distinct pitch, quality, and duration, as part of a test protocol."

Next, [*45] the Court must examine the intrinsic evidence to determine whether that ordinary meaning has been rebutted. Diagnostic argues that nothing in the specification or prosecution history assigns a different meaning to this term. Benson, on the other hand, argues that based on its assertion of prosecution history estoppel, tones must be generated in the conventional audiometer.

As discussed previously, the Court rejects Benson's attempt to import structural limitations not supported by the intrinsic evidence. Specifically, nothing in the intrinsic evidence requires tones to be generated in the conventional audiometer. Moreover, claim 9 is a method claim that does not require a conventional audiometer. The Court, therefore, adopts the ordinary meaning and construes the phrase "generating a test tone" as "generating a tone, or a sound of distinct pitch, quality, and duration, as part of a test protocol."^{T15} *Controlling the steps of outputting, generating the test tone, storing, generating the analog sound, and switching*

The phrase "controlling the steps of outputting, generating the test tone, storing, generating the analog sound, and switching" appears in claim 9 of the '482 Patent. [*46] The Court finds that there is nothing ambiguous or linguistically obscure about this phrase and that it is sufficiently clear such that no further construction is necessary. Therefore, the Court declines to construe this claim language. See Lucent Techs., 168 F. Supp. 2d at 191

16. Analog sound derived from digital data and analog signal

The terms "analog sound derived from digital data" and "analog signal" appear in claim 9 of the '482 Patent. Diagnostic asserts that these two terms are synonymous and both should be construed as an "analog signal representative of a voice instruction and/or message." Benson, on the other hand, asserts that using plain and ordinary meaning of the terms require that "analog sound" be construed as "continuously variable, measurable, physical quantities perceived by the sense of hearing" and that "analog signal" be construed as "a continuously variable, measurable, physical quantity or impulse (as a voltage, current, or magnetic field strength) by which messages or information can be transmitted."

The definition of analog is "of relating to, or being a device in which [*47] data are represented by continuously variable, measurable, physical quantities, such as length, width, voltage, or pressure." *American Heritage Dictionary* 64 (4th ed. 2000). "Signal" is defined as "a detectable physical quantity or impulse (as a voltage, current, or magnetic field strength) by which messages or information can be transmitted." Webster's 2115. Therefore, the ordinary meaning of "analog signal" is "a continuously variable, measurable, physical quantity or impulse (as a voltage, current, or magnetic field strength) by which messages or information can be transmitted."

The Court now turns to the intrinsic record. While the claimed invention is a device and a method for implementing a hearing test in which the sounds heard by the test subject switch between test tones and signals that may be voice instructions and/or messages, the Court notes that the specification indicates that "the particular signals could be representative of virtually any type of information which is subject to derivation from digital data ... for example, visual graphics and images and others." ('482 Patent, col. 10, 11. 35-40.) Therefore, the Court finds that the specification does not rebut [*48] the presumption that the ordinary meaning of the term applies and construes the term "analog signal" as a "continuously variable, measurable, physical quantity or impulse by which messages or information can be transmitted."

Diagnostic argues that in the text of claim 9, the term "analog signal" and "analog sound" are used interchangeably. Specifically, claim 9 specifies, in part:

generating an analog sound derived from the digital data;
switching the audible sound from the step of outputting between the test tone
and the analog signal.

Diagnostic argues that because the phrase "analog sound" is followed in the next line with "the analog signal," the term is being used interchangeably. Benson argues that because the two different terms both appear in the same claim, they must have different meanings. The Court finds that the terms are used interchangeably and therefore, "analog sound" is properly construed as a "continuously variable, measurable, physical quantity or impulse by which messages or information can be transmitted."

17. Means for outputting sound signals

A patentee may express an element in a claim "as a means or step for performing a specified function [*49] without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specifications and equivalents thereof." 35 U.S.C. § 112, 1 6 (2000). Use of the term "means" creates a presumption that the inventor used the term to trigger §

112, P 6. Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1427 (Fed. Cir. 1997); Micro Chem, Inc. v. Great Plains Chem. Co., 194 F.3d 1250, 1257 (Fed. Cir. 1999). This presumption may be rebutted, however, when the claim recites structure sufficient for performing the function. See Sage Prods., 126 F.3d at 1427-28. Under the means-plus-function analysis, the Court begins by identifying the recited function of the limitation. See Micro-Chem., 194 F.3d at 1258. After the Court identifies the claimed function, the Court must identify the corresponding structure in the written description necessary to perform that function. See *id.* 194 F.3d at 1258.

The first element of claim 4 of the '681 Patent reads "means for outputting sound signals [*50] generated from digital information of the computer." Because the claim element fails to recite sufficient structure, material, or acts for performing the function, the presumption is not rebutted. See Sage Prods., 126 F.3d at 1428. The Court begins by determining the claimed function. Diagnostic argues that the function is properly construed as "outputting analog signals representative of voice instructions and/or messages." Benson does not offer an alternative construction of the claimed function, but instead asserts that the "means for outputting sound signals" phrase does not need construction.

The Court construes the term "sound signals generated from digital information" with respect to the '482 Patent as "detectable physical quantities or impulses, generated from digital information, that can be perceived by the sense of hearing by which messages or information can be transmitted." n7 In addition, the Court finds that the word "outputting" is self-explanatory and does not require construction. Finally, the Court refuses to import the limitations proposed by Diagnostic into the recited function. See Micro-Chem., 194 F.3d at 1258; Generation II Orthotics, Inc. v. Med. Tech. Inc., 263 F.3d 1356, 1364-65 (Fed. Cir. 2001) [*51] ("When construing the functional statement in a means-plus-function limitation, we must take great care not to impermissibly limit the function by adopting a function different from that explicitly recited in the claim."). The Court thus identifies the function as "outputting detectable physical quantities or impulses, generated from digital information, that can be perceived by the sense of hearing by which messages or information can be transmitted."

- - - - - Footnotes - - - - -

n7 It appears that Diagnostic proposes that "sound signals generated from digital information of the computer" be construed consistently in both Patents. Because this construction is supported by the '681 Patent's specification, the Court incorporates it into the recited function of this claim element.

- - - - - End Footnotes- - - - -

Next, the Court consults the '681 Patent's written description to identify the structure corresponding to the function. See Micro Chem., 194 F.3d at 1258. Diagnostic claims that the patent lists several alternative structures for performing the function [*52] of "outputting sound signals;" specifically, 1) a computer; 2) a sound wave generator; 3) a multimedia converter; 4) a multimedia output port of computer (102), multimedia input interface (110), multimedia talk over card (118b), and earphone jack (48); or 5) a sound card of computer (102), multimedia input interface (110), multimedia talk over card (118b), and earphone jack (48). Although Benson identifies different corresponding structure necessary to perform the function for "outputting sound signals" in its opening brief, Benson acknowledged during oral argument that it does not object to the structure identified by Diagnostic for this means-plus-function element. Because Diagnostic's proposed construction is supported by the patent's written description, the Court adopts Diagnostic's proposed corresponding structure.

18. Means for outputting test signals

The use of the word "means" in the second element of claim 4 of the '681 Patent invokes a presumption that § 112, f 6 applies. Because the claim element fails to recite sufficient structure, material, or acts for performing the function, the presumption is not rebutted. See *Sage Prods.*, 126 F.3d at 1428. [*53] Again, the Court begins with a determination of the specified function. As stated in the means clause, the function of this element is for "outputting test signals generated by the conventional audiometer according to pre-programmed logic of the conventional audiometer." The Court has determined that the word "outputting" need not be construed and has previously construed "conventional audiometer" and "pre-programmed logic."

Diagnostic argues that because the '681 Patent teaches that a conventional audiometer generates test tones for evaluation of hearing and because the intrinsic evidence makes clear that "test signals" are test tones, the function of this element is properly construed as "outputting test tones." Benson does not offer an alternative construction of the claimed function, but instead asserts that the phrase does not require construction. Although the Court recognizes that the specification language demonstrates that test signals can include test tones, the limiting language proposed by Diagnostic is not found in the claim language itself. Therefore, the Court will not import that limitation into the recited function. See *Micro Chem.*, 194 F.3d at 1258. [*54] Thus, the Court identifies the function as "outputting test signals generated by the conventional audiometer according to pre-programmed logic of the conventional audiometer."

Next, the Court consults the specification to identify the corresponding structure described therein for performing the claimed function. See *id.*, 194 F.3d at 1258. Diagnostic contends that the corresponding structures are: (1) a conventional audiometer; or (2) a device having both microprocessor and audio circuitry for administering a hearing test. In support, Diagnostic points to the language of the patent, wherein it teaches that the conventional audiometer outputs test tones. ('681 Patent, col. 4, 11. 37-67; col. 5, 11. 1-62.) Benson, on the other hand, argues that, based on explicit disclosures in the specification, the structure required is a tone generator located *in* a conventional audiometer and statutory equivalents thereof.

The specification of the '681 Patent confirms that it is the conventional audiometer that outputs test signals or tones. ('681 Patent, col. 1,11. 12-13; col. 5,11. 13-24; col. 4,11. 37-67; col. 5. 11. 1-62.) In addition, the "conventional audiometer" has been [*55] construed as a "device having both microprocessor circuitry and audio circuitry for administering a hearing test." The Court finds no language in the intrinsic evidence indicating that the structure required is a tone generator specifically located in a conventional audiometer. The Court therefore identifies the structure that corresponds to "outputting test signals" as: (1) a conventional audiometer; or (2) a device having both microprocessor and audio circuitry for administering a hearing test.

19. Means for switching

The use of the word "means" in the third element of claim 4 of the '681 Patent invokes a presumption that § 112, P 6 applies. Because the claim element fails to recite sufficient structure, material, or acts for performing the function, the presumption is not rebutted. See *Sage Prods.*, 126 F.3d at 1428. As stated in the means clause, the recited function of this element is for "switching between the means for outputting sound signals and the means for outputting test signals." Because the "means for outputting sound signals" and the "means for outputting test signals" have already been construed by the Court, the only language to be construed [*56] is "switching between."

Diagnostic argues that the plain and ordinary function of "switching between" is "to alternatively enable either" the means for outputting sound signals or the means for outputting test signals to output and audible sound. Benson contends that this suggested construction is more complicated than the claim itself. The Court agrees. The plain and ordinary meaning of the recited function is for "switching between the means for outputting sound signals and the means for outputting test signals." Diagnostic asserts that the plain language of claim 4 indicates that the "switching occurs between the means for outputting sound signals and the means for outputting test signals." The Court agrees but finds that the language of the element itself clearly articulates that function. Therefore, the Court finds that the recited function is simply for "switching between the means for outputting sound signals and the means for outputting test signals."

The Court next consults the specification to identify the corresponding structure. See Micro Chem., 194 F.3d at 1258. Diagnostic contends that the corresponding structures are: (1) multimedia talkover card (118b); [*57] or (2) relays (64a and 64b) and switches (66a and 66b). In its Response Claim Construction Brief, Benson noted that it does not object to the structure identified by Diagnostic. Rather, based on its previous estoppel argument, Benson asserts that the structures corresponding to the "means for switching" function must be located in the conventional audiometer.

The Court finds support for Diagnostic's proposed construction and finds that the '681 Patent teaches two structures for "switching between." First, the talkover card (8b) "serves as a switch to divert input to the earphone jack (48) when desired by a human test administrator . . ." ('681 Patent, col. 6, 11. 16-23) (emphasis omitted). In addition, the patent explains that the multimedia audiometer of the claimed invention includes a multimedia talkover card (118b), which shares many features that are substantially the same as the features of the talkover card (8b), including the ability to act as a switch. ('681 Patent,..col. 7, 11. 51-67; col. 8, 11. 1-22.) Therefore, the multimedia talkover card (118b) is one structure corresponding to the function of "switching between." Second, the '681 Patent teaches the use of relays (64a [*58] and 64b) to open and close the switches (66a and 66b) to switch between the two outputs. ('681 Patent, col. 10,11. 8-19, 35-50.) Finding nothing in the prosecution history that unambiguously requires the structures corresponding with the "means for switching" function to reside in the conventional audiometer, and finding support for Diagnostic's proposed corresponding structure in the specification, the Court adopts Diagnostic's proposed corresponding structure..

20. Means for controlling

The use of the word "means" in the fourth element of claim 4 of the '681 Patent invokes a presumption that § 112, 6 applies. Because the claim element fails to recite sufficient structure, material, or acts for performing the function, the presumption is not rebutted. See Sage Prods., 126 F.3d at 1428. The stated function of this element is for "controlling the means for switching." The Court has already determined that the function "means for switching" is not ambiguous.

Diagnostic argues that the function of the "means for controlling the means for switching" element is for "intelligently and automatically directing the means for switching to enable the means for outputting [*59] sound signals to output voice instructions and/or messages upon the occurrence of a test subject error." In support, Diagnostic argues that "the crux of the '681 invention is that this switching is directed in an intelligent and automatic fashion." Diagnostic Claim Constr. Mem. for U.S. Patent No. 5,811,681 at 20. Diagnostic cites to portions of the patent specification that generally describe the invention's ability to switch between outputting test tones and sound signals to pass appropriate, corrective instructions on to the test subject after an error has been made.

In response, Benson contends that Diagnostic's suggested function is more complicated

than the claim itself and is unsupported by the intrinsic record. The Court agrees. The plain language of the claim states that the function of the element is for "controlling the means for switching." Diagnostic's suggested recited function, which would construe "controlling" as "intelligently and automatically directing," has no basis in the claim language. See *Micro Chem.*, 194 F.3d at 1258; *Generation II Orthotics*, 263 F.3d at 1364-65. Moreover, the intrinsic evidence does not support Diagnostic's [*60] proposed importation of the words "intelligently and automatically" into the recited function of this element. Therefore, the Court concludes that the stated function is simply for "controlling the means for switching."

The Court now consults the specification to identify the corresponding structure. See *Micro Chem.*, 194 F.3d at 1258. Diagnostic contends that the corresponding structure is computer (102). Benson asserts that the structure is "the computer and triggering relays from the conventional audiometer and statutory equivalents thereof." In its responsive memorandum, Benson also notes that while it prefers its own structure, it does not object to the structure identified as required by Diagnostic for this claim term.

The specification supports Diagnostic's contention that the corresponding structure is computer (102). ('681 Patent, col. 10,11. 8-19; col. 10,11. 35-45; col. 10,11. 56-67; col. 11,11. 1-3; col. 12, 11. 19-23.) Conversely, the specification also indicates that the relays (64a and 64b) do not control switches, but only respond to the control exerted by computer (102) to trigger switches (66a and 64b). Therefore, these relays do not correspond to [*61] the function of "controlling the means for switching." The Court therefore concludes the structure that corresponds to the "means for controlling the means for switching" is computer (102).

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The motions to construe claims of the '681 and '482 Patents [Docket No. 45 in Civ. No. 02-777; Docket No. 32 in Civ. No. 02-3466] are CONSTRUED as indicated above.

Dated: March 28, 2005

JOAN N. ERICKSEN

United States District Judge

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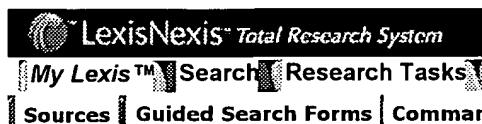
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